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No. ____

IN THE

Supreme Court of the United States

CHARLES GILBERT GIBBS, ET AL.,

Petitioners,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Commerce Clause authorizes federal restrictions on the ability of individuals to defend themselves and their property from wild wolves, when such actions are wholly intrastate and noncommercial.

INTERESTED PARTIES

Petitioners, plaintiffs below, are Charles Gilbert Gibbs; Richard Lee Mann, III; Hyde County, North Carolina; and Washington County, North Carolina.

The federal respondents, defendants below, are Bruce Babbitt, Secretary of the Interior; United States Fish and Wildlife Service; United States Department of the Interior; and Jamie Clark, Director of the United States Fish and Wildlife Service.

The private respondent is Defenders of Wildlife, which intervened as a defendant in the lower courts.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Charles Gilbert Gibbs, *et al.* respectfully petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-55a) is reported at 214 F.3d 483. The order of the district court (App., *infra*, 58a-69a) is reported at 31 F. Supp. 2d 531.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2000. A petition for rehearing was denied on August 25, 2000. App., *infra*, 56a-57a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND REGULATION INVOLVED

The Commerce Clause provides that "[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3.

The federal regulation at issue, 50 C.F.R. § 17.84(c), is reproduced in the Appendix, *infra*, 70a-74a.

STATEMENT OF THE CASE

Petitioners challenged the constitutionality, under the Commerce Clause, of a federal regulation that generally prohibits individuals from protecting themselves and their property from the depredations of wild wolves, even where such actions are wholly intrastate and noncommercial in nature. The district court granted summary judgment for respondents. The court of appeals, over Judge Luttig's dissent, affirmed.

1. This case involves a regulation promulgated under the Endangered Species Act of 1973 ("ESA"), Pub. L. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-44 (1994 & Supp. III 1997)). The regulation at issue generally prohibits human interference with red wolves, a species of wild animal recently reintroduced to North Carolina by the federal government. *See* 50 C.F.R. § 17.84(c).

The ESA authorizes the Secretary of the Interior to designate animal species as "endangered" or "threatened." 16 U.S.C. § 1533. Among other prohibitions, the ESA makes it unlawful for any person to "take" an endangered or threatened species without a permit. 16 U.S.C. § 1538(a)(1)(B). The term "take" is defined as

"to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

The ESA also authorizes the Secretary to release an "'experimental population' . . . of an endangered species or a threatened species" into areas currently unoccupied by that species. 16 U.S.C. § 1539(j)(1)-(2)(A). A reintroduced experimental population is "treated as a threatened species." 16 U.S.C. § 1539(j)(2)(C). That designation allows the Secretary to specify, by rule, the prohibitions of and exceptions to the ESA that apply to the experimental population. *See* 16 U.S.C. § 1533(d).

Pursuant to these provisions of the ESA, and acting under delegated authority from the Secretary of the Interior, the U.S. Fish and Wildlife Service ("FWS") developed a special program to reintroduce the red wolf (*Canis rufus*)—which had been designated an endangered species in 1967, *see* 32 Fed. Reg. 4001 (Feb. 24, 1967)—as an experimental population. An effort was initiated in 1980 to release red wolves in Kentucky and Tennessee, but that plan was eventually withdrawn in 1984 due to public opposition. *See* App., *infra*, 59a-60a n.1. A subsequent effort to release red wolves into the Alligator River National Wildlife Refuge, located in eastern North Carolina, was proposed in 1986 and launched in the fall of 1987. *See id.* at 59a-60a. FWS described the geographic scope of the reintroduction as follows: "The Alligator River National Wildlife Refuge reintroduction site is within the historic range of the species in North Carolina, in Dare and Tyrrell Counties; because of their proximity, Beaufort, Hyde, and Washington Counties are also included in the experimental population designation." 50 C.F.R. § 17.84(c)(9)(i).

In conjunction with the federal government's effort to reintroduce red wolves to North Carolina, FWS promulgated a regulation concerning the experimental population. *See* 50 C.F.R. § 17.84(c). That regulation prohibits, with limited exceptions, the "taking" of red wolves by private persons. *See* 50 C.F.R. § 17.84(c)(2). The ESA authorizes both civil and criminal penalties for violations of its provisions or regulations promulgated thereunder. *See* 16 U.S.C. § 1540(a)-(b).

2. Although the initial site of reintroduction was on federal land, red wolves have wandered onto private property with disturbing ease and frequency. "From available data, as of February 1998 it was estimated that about 41 of the approximately 75 wolves in the wild may now reside on private land." App., *infra*, 5a. The federal government's proven inability to protect private landowners from incursions by red wolves creates an inevitable and dangerous conflict between wolves and humans. *See* App., *infra*, 19a ("Since reintroduction, red wolves have strayed from federal lands onto private lands. Indeed, wolves are known to be 'great wanderers.'") (citation omitted).

– Petitioner Richard Lee Mann, III, is a resident of Hyde County, North Carolina, whose small son was threatened by a red wolf. *See* C.A. App. 8. He was subsequently prosecuted under 50 C.F.R. § 17.84(c) for killing a red wolf that he believed was a threat to his cattle. *See* C.A. App. 8. Following a guilty plea, he was fined $2,000 and sentenced to perform community service building "wolfhouses" and feeding red wolves. *See* App., *infra*, 62a. Petitioner Charles Gilbert Gibbs is also a Hyde County resident. He has lost several calves, ap-

parently to red wolf attacks, for which FWS has refused to reimburse him. *See ibid.*

Petitioners Hyde County and Washington County are, as FWS has recognized, proximate to the Alligator River National Wildlife Refuge reintroduction area and therefore are subject to incursion by red wolves. *See* 50 C.F.R. § 17.84(c)(9)(i). In response, the County Commission of Washington County approved a resolution in 1992 opposing the red wolf program. *See* App., *infra*, 62a. The County Commission of Hyde County approved a resolution in 1994 requesting removal of red wolves from private lands within the county. *See ibid.* In addition to these resolutions by the county petitioners, the North Carolina General Assembly passed a law entitled "An Act to Allow the Trapping and Killing of Red Wolves by Owners of Private Land." *Id.* at 7a, 62a-63a (citing 1994 N.C. Sess. Laws Ch. 635). The North Carolina Department of Agriculture has also objected to the red wolf program. *See* App., *infra*, 62a.

3. Petitioners sued the federal agencies and officials responsible for the red wolf reintroduction program, challenging the constitutionality of the red wolf regulation. In particular, petitioners alleged that the prohibition against the "taking" of red wolves on private property exceeded the federal government's authority under the Commerce Clause. *See* App., *infra*, 8a.

a. The district court granted summary judgment for respondents. The court recognized that the sole "nexus between the regulation at issue and interstate commerce is the red wolf." App., *infra*, 66a. The court concluded that red wolves "substantially affect interstate commerce through their tourism value." *Ibid.* That is because, according to the court, "tourists do cross state lines to see

the red wolf." *Id.* at 67a. While the court acknowledged that it was "difficult . . . to fully assess the red wolf's impact on tourism," the court noted that "many persons have traveled from other states to attend red wolf 'howling' events conducted at the Alligator River National Wildlife Refuge in North Carolina." *Id.* at 67a n.9. "Unrestricted taking of red wolves on private land," the court said, "would present a clear threat to this commerce." *Id.* at 67a.

b. The court of appeals, by divided vote, affirmed. The panel members all agreed that the constitutionality of the red wolf regulation had to be evaluated under the standards articulated by this Court in *United States* v. *Morrison*, 120 S. Ct. 1740 (2000), and *United States* v. *Lopez*, 514 U.S. 549 (1995). They differed, however, as to the application of those standards in this case.

The majority recognized that, "[t]o fall within Congress's commerce power, this regulation . . . must 'substantially affect interstate commerce.'" App., *infra*, 14a (quoting *Lopez*, 514 U.S. at 559). The majority held that this standard was satisfied because "[t]he relationship between red wolf takings and interstate commerce is quite direct—with no red wolves, there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts." App., *infra*, 15a-16a. The majority also recognized that the prohibition against taking red wolves must constitute "economic activity." *Id.* at 15a (citing *Morrison*, 120 S. Ct. at 1750). The majority said, without citing any authority or record evidence, that this requirement was met because "[f]armers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops." App., *infra*, 15a. The majority

thus concluded that, "[w]hile the taking of one red wolf on private land may not be 'substantial,' the takings of red wolves in the aggregate have a sufficient impact on interstate commerce to uphold this regulation." *Id.* at 16a.

Judge Luttig dissented. He maintained that the majority's decision could not be reconciled with this Court's decisions in *Lopez* and *Morrison*. *See* App., *infra*, 47a. As Judge Luttig explained, "[t]he killing of even all 41 of the estimated red wolves that live on private property in North Carolina would not constitute an economic activity of the kind held by the Court in *Lopez* and in *Morrison* to be of central concern to the Commerce Clause, if it could be said to constitute an economic activity at all." *Id.* at 50a. Moreover, according to Judge Luttig, "even assuming that such is an economic activity, it certainly is not an activity that has a substantial effect on interstate commerce." *Ibid.* Judge Luttig concluded that the majority's analysis was akin to (if not more expansive than) that of the dissenters in *Lopez* and *Morrison* rather than the majorities, and would, if accepted, "consign[] to aberration" this Court's decisions in those cases. *Id.* at 51a.

REASONS FOR GRANTING THE PETITION

This case presents a constitutional question substantially identical to one of the issues currently before the Court in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, No. 99-1178 ("*SWANCC*"). Accordingly, the petition should be held pending the Court's disposition of that case. If this Court reaches the constitutional question in *SWANCC*, this case should be remanded to the court of appeals regardless of how the issue is resolved in *SWANCC*. In

the event the Court does not reach the constitutional question in *SWANCC*, however, the Commerce Clause question presented by this case warrants plenary review.

I. The Petition Should Be Held Pending The Court's Decision in *SWANCC*

At issue in *SWANCC* is the U.S. Army Corps of Engineers' so-called "migratory bird rule." *See* 51 Fed. Reg. 41,206 (Nov. 13, 1986). This administrative interpretation of the Clean Water Act (33 U.S.C. § 1251 *et seq.*) purports to authorize the exercise of federal jurisdiction over isolated, intrastate waters based solely on the presence of migratory birds. *See* 51 Fed. Reg. at 41,217 (asserting federal jurisdiction over all waters "[w]hich are or would be used as habitat by . . . migratory birds which cross state lines").

The petitioner in *SWANCC* has presented two questions: Whether the migratory bird rule is a permissible construction of the Clean Water Act, and, if so, whether it is within the federal government's authority to regulate interstate commerce. *See* Pet. Br. in *SWANCC* at 11-13. The latter question is substantially identical to the question in this case.

If this Court in *SWANCC* concludes that the Corps' migratory bird rule is authorized by statute, then it will have to analyze the constitutionality of the rule under the Commerce Clause framework set forth in *Lopez* and reiterated last Term in *Morrison*. In *Lopez*, the Court recognized three strands of Commerce Clause authority: "First, Congress may regulate the use of channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce,

even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59 (citations omitted).

As the decisions below in *SWANCC* and in this case make clear, both cases turn on the scope of federal authority under the third strand identified in *Lopez*, which permits Congress to regulate activities that "substantially affect" commerce. *See SWANCC*, 191 F.3d 845, 849 (7th Cir. 1999) ("The gun control law at issue in *Lopez*, like the migratory bird rule challenged here, could only have been sustained as an exercise of the third variety of regulatory power"); App., *infra*, 12a ("if 50 C.F.R. § 17.84(c) [the red wolf regulation] is within the commerce power, it must be sustained under the third prong of *Lopez*").

Moreover, the application of the "substantial effects" test arises in similar contexts in both *SWANCC* and in this case. In *SWANCC*, the asserted connection to interstate commerce is provided by wild birds; here, the commerce nexus is purportedly provided by wild wolves. In both cases, it is the presence of wild animals on private property that is asserted as the sole basis for the exercise of federal jurisdiction over human activities on that property. Arising as they do from parallel premises, the regulations at issue in both *SWANCC* and this case raise substantially the same constitutional question: Does the mere presence of wild animals substantially affect interstate commerce such that Congress can regulate human activities on private property that might impact those animals?

The "substantially affects" strain of Commerce Clause jurisprudence requires the Court to undertake four subsidiary inquiries: (i) whether the regulation by its terms reaches commercial or economic activity; (ii) whether the causal link between the regulated activity and interstate commerce is direct or attenuated; (iii) whether the regulation contains an express jurisdictional element; and (iv) whether Congress has made findings regarding the regulated activity's effect on interstate commerce. *See Morrison*, 120 S. Ct. at 1749-51. Each of these inquiries is implicated, in very similar fashion, by both *SWANCC* and this case. Accordingly, this petition should be held pending the Court's resolution of *SWANCC*.

First, the Court has allowed intrastate activities to be considered, *in the aggregate*, as having a substantial effect on interstate commerce only when "the regulated activity was of an apparent commercial character." *Morrison*, 120 S. Ct. at 1750 n.4; *see also Lopez*, 514 U.S. at 561 (Congress may regulate those intrastate activities that "arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce"). This is no surprise, since the Commerce Clause, after all, authorizes Congress to regulate only interstate *commerce*, not interstate *activity*.

An important question in both *SWANCC* and this case is whether the regulated human conduct—filling bird-habitat puddles in *SWANCC*, taking wolves in this case—constitutes commercial or noncommercial activity. Neither of the challenged regulations is limited to commercial activity, and the mere existence of wild animals has not heretofore been considered "economic"

in nature. While the Court has suggested that the commerce power extends, unsurprisingly, to *commercial transactions* involving captured animals or their parts (*Andrus* v. *Allard*, 444 U.S. 51, 63 & n.19 (1979)), the Court has never said, much less held, that the Commerce Clause is brought into play due to the simple *presence* of wild animals on private property. The Court's resolution of this issue in the context of birds is likely to be instructive, if not controlling, of the resolution of the same issue in the context of wolves.

Second, the lower courts in both *SWANCC* and this case concluded that human activities that might affect wild animals may constitutionally be regulated because of purported causal links between wild animals and economic activity. In both cases, the courts concluded that human-induced reductions in wildlife might depress interest in interstate tourism or negatively impact the supply of a commercial resource in some manner. *See SWANCC*, 191 F.3d at 850 (upholding migratory bird rule on ground that, "throughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds") (quoting *Hoffman Homes, Inc.* v. *EPA*, 999 F.2d 256, 261 (7th Cir. 1993)); App., *infra*, 15a-16a ("with no red wolves, there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts"). Yet both *SWANCC* (involving a proposed landfill on private property) and the present case (also involving private land) push the tourism argument to its outermost reaches—to say the least.

Quite similar theories of causation were rejected by the Court in *Lopez* and *Morrison* on the ground that they involved excessively attenuated chains of causation to

link the regulated activity with its effects on interstate commerce. *See Lopez*, 514 U.S. at 567 ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"). Both *SWANCC* and this case test the limits of *Lopez* and *Morrison*, inviting the Court to distinguish the impact of human activity on animals and their habitats (asserted in both *SWANCC* and this case) from the impact of human activity on people and their neighborhoods (held insufficient in *Lopez* and *Morrison*) on interstate tourism or travel. These cases also invite the Court to contrast the commercial interest in human resources, already rejected as insufficient in *Lopez* and *Morrison*, from the commercial interest in wildlife resources asserted by the government in *SWANCC* and this case.

Lopez and *Morrison* identified causal chains that were simply too attenuated and too speculative to constitute a substantial effect on interstate commerce. The causal chains in both *SWANCC* and this case bear striking resemblance to those already held insufficient. *See Cargill, Inc.* v. *United States*, 516 U.S. 955, 957-58 (1995) (Thomas, J., dissenting from denial of certiorari) (stating that "[t]he basis asserted to create federal jurisdiction over petitioner's land [pursuant to the migratory bird rule] seems to me to be even more far-fetched than that offered, and rejected, in *Lopez*"); App., *infra*, 50a (Luttig, J., dissenting) ("The number of inferences (not even to mention the amount of speculation) necessary to discern in this activity a substantial effect on interstate commerce is exponentially greater than the number nec-

essary in *Lopez* . . . or in *Morrison*"); Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 Tex. Rev. L. & Pol. 365, 419 (1998) ("If this elaborate chain of contingencies does not stretch the limits of reason, it is hard to imagine a chain that would"). The Court's resolution of the attenuation question with respect to the birds in *SWANCC* will control, or at least directly impact, the resolution of the same question as to the wolves in this case.

Third, neither the migratory bird rule nor the red wolf regulation contains any express jurisdictional element. Thus, both *SWANCC* and this case raise the question whether the determination that wildlife preservation constitutes a valid national concern is, alone, sufficient to permit federal regulation of wholly intrastate, noncommercial activity. *See* U.S. Br. in *SWANCC* at 37 ("[b]ecause migratory birds are a shared resource of the several States, their protection has traditionally been regarded as a task most appropriately performed by the national government"); *compare* App., *infra*, 45a (noting that "the national interest in the development of natural resources" must be considered in determining the scope of federal power under Commerce Clause) *with id.* at 47a-48a (Luttig, J., dissenting) ("the simple (and frankly, considerably less incitant) question of law for us to decide is" not whether there is a national interest in conserving natural resources, but rather "whether . . . this one particular Fish and Wildlife regulation exceeds Congress' power under the Commerce Clause"). The Court's determination whether bird protection of itself is a constitutionally sufficient rationale in *SWANCC* will

directly bear on the sufficiency of the government's interest in wolf reintroduction at issue in this case.

Fourth, both the migratory bird rule and the red wolf regulation are administrative regulations, not statutes as in *Lopez* and *Morrison*. As a result there are no congressional findings regarding the regulated activity's ostensible effect on commerce. *See Lopez*, 514 U.S. at 562 ("as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce"). Moreover, neither the Corps in announcing the migratory bird rule nor FWS in promulgating the red wolf regulation attempted to establish any link between these federal proscriptions and interstate commerce. Therefore, there are no legislative or administrative findings in either *SWANCC* or this case to which this Court might look, much less defer.

In any event, while "[d]ue respect for the decisions of a coordinate branch of Government demands that [this Court] invalidate a *congressional enactment* only upon a plain showing that Congress has exceeded its constitutional bounds" (*Morrison*, 120 S. Ct. at 1748 (emphasis added)), the Court does not give the same deference to constitutional interpretations made by bureaucrats in the Executive Branch. *See, e.g.*, *Miller* v. *Johnson*, 515 U.S. 900, 922 (1995). That is particularly true here, where the interstate commerce rationale for the regulation has been articulated only by the government's lawyers in the context of this litigation. *See Martin* v. *OSHRC*, 499 U.S. 144, 156 (1991). The district court in this case, however, concluded that the fact that the asserted federal authority was premised on a

regulation rather than a federal statute was of no consequence to the Commerce Clause analysis. *See* App., *infra*, 64a ("this Court can analyze 50 C.F.R. § 17.84 in the same way it would had that regulation been passed by both Houses of Congress and signed by the President, as opposed to promulgated through the exercise of delegated rulemaking authority"). The Court's consideration in *SWANCC* whether there is any constitutional significance to the distinction between congressional enactments and administrative interpretations will be dispositive of the same problem in this case.

II. This Case Should Be Remanded To The Court Of Appeals Regardless Of How The Court Resolves The Constitutional Question In *SWANCC*

In light of the many similarities between the constitutional questions raised in both *SWANCC* and this case, it cannot seriously be doubted that a constitutional ruling in *SWANCC* will necessarily have a dramatic impact on the validity of the Fourth Circuit's decision—as the government itself has already recognized. The government has cited the court of appeals' decision in this case as support for upholding the migratory bird rule in *SWANCC*. Its brief in *SWANCC* suggests that, if the taking of wolves substantially affects commerce, so does the destruction of migratory bird habitat. *See* U.S. Br. in *SWANCC* at 37-38 n.29 (discussing the decision below). The converse equally holds: if destruction of migratory bird habitat does *not* substantially affect commerce, neither does the taking of wolves. *See* Holman, *After* United States v. Lopez*: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 Va. Envtl. L.J. 139, 139 (1995) ("*Lopez* poses a considerable threat to portions of the Endan-

gered Species Act (ESA) and the Clean Water Act (CWA), because these two federal environmental laws, as applied, lack a strong connection to interstate commerce").

1. In the event this Court reverses on the constitutional question in *SWANCC*, certiorari should be granted in this case, the decision below should be vacated, and the case should be remanded to the court of appeals for further consideration. If the migratory bird rule is held unconstitutional in *SWANCC*, grave doubts, to say the least, will be cast on the red wolf regulation challenged here. The court of appeals should be given the opportunity to reconsider its decision in light of the Court's decision in *SWANCC*.

2. Even if this Court were to affirm on the constitutional question in *SWANCC*, the Court should remand this case to the court of appeals.

SWANCC is the first case before this Court in which a federal regulation of wholly intrastate, noncommercial activities affecting wild animals has been directly challenged under the Commerce Clause. Yet there are several differences between this case and *SWANCC* which render the challenged regulation in the present case even further outside the scope of federal commerce power than that challenged in *SWANCC*.

First, the government claims in *SWANCC* that "[t]he proposed activity for which petitioner sought a federal permit—the filling of ponds in order to construct a municipal landfill—is plainly of a commercial nature." U.S. Br. in *SWANCC* at 43. Irrespective of the merits of this argument (which appears identical to one rejected in

Lopez, 514 U.S. at 561), it cannot save the regulation challenged in this case.

The red wolf regulation is not a regulation of commerce even under the distinction urged by the government in *SWANCC*. Just as in *Lopez*, *see* 514 U.S. at 567, there is "no reason to believe" that the activity prohibited by the red wolf regulation will be in any way "typical[ly]" commercial. U.S. Br. in *SWANCC* at 47 n.38. In practice just as in its plain text, the red wolf regulation applies to private residential properties and commercial ones with equal force and regularity. Indeed, FWS has recognized the threat posed by red wolves to human safety and private property, making the concerns affected by the red wolf regulation particularly noncommercial, and thus substantially more similar to *Morrison* and *Lopez* than *SWANCC*. *See* 63 Fed. Reg. 54151, 54152 (Oct. 8, 1998) (terminating red wolf release program in the Great Smoky Mountains National Park, noting that the red wolf is "a behaviorally unsuitable animal" which "represents a demonstrable ... threat to human safety"); 60 Fed. Reg. 18940, 18943 (Apr. 13, 1995) ("Wolves that come in close proximity to private residences may cause property damage by killing pets or removing and/or physically defacing small property items. In addition, private individuals may not want the animals on their property because they fear them or consider them a nuisance.").

Thus, even if the Court determines that the regulation in *SWANCC*, though lacking a jurisdictional "interstate commerce" element, is sufficiently related to commercial conduct to avoid the reach of *Lopez*, remand will be necessary to determine whether *this* case falls within the

ambit of *Lopez*, as clarified by the Court's decision in *SWANCC*.

Second, in *SWANCC* the government urges that the interstate *travel* of migratory birds alone is sufficient to trigger the federal commerce power, even without any showing of impact on interstate *commerce*. *See* U.S. Br. in *SWANCC* at 39 ("[Migratory birds] can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein.") (quoting *Missouri* v. *Holland*, 252 U.S, 416, 435 (1920)); *id.* at 40 ("Like water flowing in an interstate river, migratory birds constitute a natural resource . . . that has no permanent locus in a single State . . . [and thus] are appropriately regarded as a shared resource of the several States").

Justice Thomas has previously rejected such reasoning. *See Cargill*, 516 U.S. at 958 (Thomas, J., dissenting from denial of certiorari) (rejecting argument that "the self-propelled flight of birds across state lines creates a sufficient interstate nexus to justify the Corps' assertion of jurisdiction over any standing water that could serve as a habitat for migratory birds"). But even were the Court to accept this novel interstate travel theory of the commerce power in *SWANCC*, such reasoning would not justify regulation of red wolves in the case at bar. There is no evidence that the red wolf looks to more than one State at a time for habitat. Indeed, FWS's regulation implementing the red wolf experimental program confirms that the geographical scope of the red wolf release is limited to a handful of counties in North Carolina, where they have adopted their "home ranges." *See* App., *infra*, 72a; *see also Nat'l Ass'n of Home*

Builders v. *Babbitt*, 130 F.3d 1041, 1058 (D.C. Cir. 1997) (Henderson, J., concurring) (rejecting similar argument); *id.* at 1063 (Sentelle, J., dissenting) (same).

Third, in upholding the migratory bird rule, the lower court in *SWANCC* relied on the government's determination that the rule was essential to protecting migratory bird species from the destruction of their habitat. *See SWANCC*, 191 F.3d at 850 ("the destruction of migratory bird habitat and the attendant decrease in the populations of these birds 'substantially affects' interstate commerce"). The anti-taking rule challenged in this case, by contrast, involves just one experimental red wolf population. Under the ESA, the Secretary must make a determination that such populations are not essential to the continuation of the species before embarking on a reintroduction program. *See* 16 U.S.C. § 1539(j)(2)(B); App., *infra*, 4a; *id.* at 60a n.2. Should the Court determine in *SWANCC* that the continued existence of wildlife species as a whole substantially affects commerce, remand to the court of appeals is necessary to determine whether the preservation of particular members of the species, deemed nonessential to the continuation of the species as a whole, also substantially affects commerce.

Fourth, the migratory birds in *SWANCC* inhabited or visited the petitioner's property at the time it was purchased. The red wolves in this case, by contrast, were introduced into petitioners' vicinity *by the federal government*. The government's suggestion that it can release wild (and dangerous) animals into areas adjacent to private land, and simultaneously assert federal jurisdiction to prohibit private landowners from interfering

with those animals, is nothing other than a bootstrap argument.

For these reasons, a decision on the constitutional question raised in *SWANCC* will provide further guidance to the court of appeals with respect to the red wolf program, necessitating remand *regardless* of how the Court actually rules on the constitutionality of the migratory bird rule.

III. In The Event The Court Does Not Reach The Constitutional Question In *SWANCC*, It Should Grant Certiorari In This Case

The petitioner in *SWANCC* has challenged not only the constitutionality of the Corps' migratory bird rule, but also the reasonableness of that rule as a construction of the Clean Water Act. It is therefore possible that the Court will reverse on the statutory issue without reaching the constitutional issue. If the Court does not reach the Commerce Clause question in *SWANCC*, this case presents an ideal vehicle for the resolution of that question.

1. Several courts of appeals have sustained the constitutionality of regulations promulgated under the ESA in the wake of *Lopez*. *See* App., *infra*, 1a-46a (upholding red wolf regulation); *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (upholding Delhi Sands Flower-Loving Fly regulation). *See also Palila* v. *Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) (upholding Palila bird regulation before *Lopez*); *United States* v. *Bramble*, 103 F.3d 1475 (9th Cir. 1996) (upholding the Eagle Protection Act); *Building Indus. Assoc. of Superior Cal.* v. *Babbitt*, 979 F.

Supp. 893 (D.D.C. 1997) (upholding fairy shrimp regulation).

Those decisions, however, have drawn considerable criticism. Indeed, *every* court of appeals decision to have upheld an ESA regulation after *Lopez* has drawn a dissent (and in the D.C. Circuit, a critical separate concurrence as well). *See* App., *infra*, 46a (Luttig, J., dissenting); *Home Builders*, 130 F.3d at 1057 (Henderson, J., concurring); *id.* at 1060 (Sentelle, J., dissenting). These splintered decisions show that the lower courts are badly torn on the scope of federal power to regulate noncommercial activities affecting wildlife. This conflict warrants this Court's immediate attention.

In this case, the court below based its ruling upholding the red wolf regulation on several different theories of "substantial effects." The various theories came under severe criticism from Judge Luttig, however. In his dissent, Judge Luttig stated that the majority's decision relied on the kind of attenuated causation theories previously rejected in *Lopez* and *Morrison*, and in so doing "consigned" those decisions "to aberration." App., *infra*, 51a (Luttig, J., dissenting). He then criticized the majority's attempt to avoid *Lopez* and *Morrison* by claiming a strong national interest in wildlife preservation, stating: "The affirmative reach and the negative limits of the Commerce Clause do not wax and wane depending upon the subject matter of the particular legislation under challenge." *Id.* at 55a (Luttig, J., dissenting).

Similarly, the D.C. Circuit upheld an ESA regulation protecting the Delhi Sands Flower-Loving Fly, but drew a scholarly dissent from Judge Sentelle. Moreover, the two judges who voted to uphold the regulation could not

even agree on a rationale for connecting the regulated activity with interstate commerce. Judge Wald concluded that the regulation protected biodiversity, and that biodiversity is an important commercial interest. *See Home Builders*, 130 F.3d at 1053 ("Each time a species becomes extinct, the pool of wild species diminishes. This, in turn, has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes."). This theory was rejected by Judge Henderson, however. *See id.* at 1058 (Henderson, J., concurring) ("it is . . . impossible to ascertain that there will be any [] impact [on commerce] at all" from biodiversity). Judge Henderson instead upheld the regulation on the ground that "the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce." *Ibid.* (Henderson, J., concurring). Writing in dissent, Judge Sentelle found the biodiversity and the "biodiversity affecting ecosystems" rationales indistinguishable, and rejected both as inconsistent with *Lopez*. *See id.* at 1065 (Sentelle, J., dissenting) ("neither Congress nor the litigants, nor for that matter Judge Wald, has pointed to any commercial activity being regulated, any commercial competition being unfairly challenged, or any other sort of commerce being destroyed by the taking of the fly").

Similar conflicts with respect to federal authority to regulate wildlife have arisen in the context of the Clean Water Act. The lower court in *SWANCC* concluded that the migratory bird rule bore a substantial relation to interstate commerce. *See* 191 F.3d at 849-51. That decision conflicted with *United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997), creating a split in authority that this

Court may have granted certiorari in *SWANCC* to resolve.

As Justice Thomas explained in his dissent from the denial of certiorari in *Cargill, Inc.* v. *United States*, the argument that modifications of migratory bird habitat substantially affect interstate commerce is "even more farfetched than that offered, and rejected, in *Lopez*." 516 U.S. at 958. *See also Hoffman Homes*, 999 F.2d at 263 (Manion, J., concurring) ("The commerce power . . . is . . . not so expansive as to authorize regulation of puddles merely because a bird traveling interstate might decide to stop for a drink"); *Leslie Salt Co.* v. *United States*, 55 F.3d 1388, 1396 (9th Cir. 1995) ("The migratory bird rule certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason"). These objections have the same force with respect to the red wolf regulation challenged in this case as with the migratory bird rule—as the government has already recognized. *See* U.S. Br. in *SWANCC* at 37-38 & n.29.

Given these serious disagreements in the lower courts, it is no surprise that the constitutionality of regulations promulgated under the ESA has drawn considerable scholarly attention. Indeed, numerous commentators have recognized that the constitutionality of certain endangered species programs, such as the red wolf regulation in this case, is doubtful in light of *Lopez* and *Morrison*. *See, e.g.*, Nagle, *The Commerce Clause Meets The Delhi Sands Flowers-Loving Fly*, 97 Mich. L. Rev. 174 (1998); Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 Tex. Rev. L. & Pol. 365, 419 (1998); Warner, *The Po-*

tential Impact of United States v. Lopez *On Environmental Regulation*, 7 Duke Envtl L. & Policy Forum 321 (1997); Sherry, *The Barking Dog*, 46 Case W. Res. L. Rev. 877, 881 (1996) (describing the destruction of endangered species habitat by private landowners as "an activity only speculatively related to interstate commerce"); Holman, *After* United States v. Lopez*: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 Va. Envtl. L.J. 139, 197 (1995).

The continuing uncertainty pervading the courts of appeals respecting the limits of the federal commerce power as regards wild animals cannot be tolerated, as this Court may already have concluded when it granted certiorari in *SWANCC*. Therefore, should the controversy in *SWANCC* be decided on statutory grounds alone, this case presents an ideal opportunity for the Court finally to resolve this important question of federal power.

2. Indeed, in light of the reasoning adopted by the court below, this case is particularly deserving of the Court's attention. The nexus between the red wolf regulation and interstate commerce is so attenuated that the lower court majority felt compelled to concoct a hypothetical commercial market in red wolf pelts in an effort to justify the exercise of the commerce power. Both the majority and FWS concede, however, that no such markets currently exist. *See* App., *infra*, 20a-21a ("[a]lthough . . . red wolves were sold for their pelts primarily in the nineteenth century, this temporal difference is beside the point"); C.A. App. 303 (September 1993 FWS environmental assessment report concluding that "[t]he red wolf is not expected to enter into com-

mercial production or to compete with any species that are harvested for commercial use," nor is it "expected to become a game species or to compete with presently taken game species").

This exercise in speculation exceeds what even the lower court in *SWANCC* was willing to do. This Court has never recognized that the mere possibility of a market appearing at some unknown time in the future is enough to satisfy the requirement of *substantial* effects on commerce today. To the contrary, as Judge Luttig correctly noted, the hypothetical market theory requires just the kind of speculation and blind inference this Court repudiated in *Lopez* and *Morrison*: "we are confronted here with an administrative agency regulation of an activity that . . . has had no economic character for well over a century now. [This is] [a]n activity that has no foreseeable economic character at all, except upon the baldest (though admittedly most humorous) of speculation that the red wolf pelt trade will once again emerge." App., *infra*, 53a (Luttig, J., dissenting). To state the matter simply, what might be in commerce some day is *not* in commerce today. An activity's effect on commerce at some unknown future date—indeed, a day that may *never* come—is too remote to survive scrutiny under *Lopez* and *Morrison*.

Moreover, the "hypothetical market" theory cannot stand in the face of the Court's unanimous decision last Term to construe the federal arson statute, in order to avoid constitutional problems, not to apply to private, owner-occupied residences, even though such residences might *someday* become rental properties. *Compare Jones* v. *United States*, 120 S. Ct. 1904 (2000) (refusing to apply federal arson statute to owner-occupied private

residence), *with Russell* v. *United States*, 471 U.S. 858 (1985) (applying federal arson statute to rental property). In doing so the Court necessarily rejected the government's assertion that the federal arson statute applies "even if the particular property victimized by crime is not at the time of the criminal act devoted to commercial activity, or itself on the market for rent or sale." U.S. Br. in *Jones* at 35-36.

3. The Court explained just last Term that "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 120 S. Ct. at 1754; *see also Lopez*, 514 U.S. at 566, 567-68. The red wolf regulation, by asserting federal authority over the ability of North Carolinians to trap or otherwise "take" wild animals, unnecessarily intrudes into an area of purely local concern. In fact, the federal regulation purports to override a North Carolina state statute that specifically authorizes the taking of red wolves in certain circumstances. *See* App., *infra*, 8a-9a.

States have long asserted plenary authority over the wild animals within their borders. As the Court has explained, this is an incidence of sovereignty that has been exercised at least since Roman times. *Geer* v. *Connecticut*, 161 U.S. 519, 523-28 (1896); *see also Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 287-88 (1977) (Rehnquist, J., concurring in part and dissenting in part) (it is "clear that the States have a substantial proprietary interest . . . in the fish and game within their boundaries"). This authority is exercised in a variety of ways, including the establishment of hunting seasons, the various schemes of fishing and other licenses required, limits on the size and number of animals that can be caught,

and the like. *See, e.g., Baldwin* v. *Montana Fish & Game Commission*, 436 U.S. 371 (1978).

The federal government's authority to regulate with respect to wild animals, by contrast, is limited to its enumerated powers. The federal government's property power, for example, authorizes it to proscribe harming wild animals on federal land. *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976). Similarly, the spending power authorizes the federal government to acquire, by purchase or easement, private land that may be used as animal habitat. *North Dakota* v. *United States*, 460 U.S. 300 (1983). The treaty power has been held to authorize the federal government to protect animals that are the subject of international concern. *Missouri* v. *Holland*, 252 U.S. 416 (1920). And the commerce power authorizes certain federal activity, such as regulating animals within the territorial waters (*i.e.*, the "channels" of commerce). *Seacoast Products*, 431 U.S. 265.

The commerce power, however, has *never* been held to authorize federal regulation of wild animals *qua* wild animals. In fact, precisely that argument was advanced by the Solicitor General in *Missouri* v. *Holland*, but was *rejected* by this Court. *Compare* 252 U.S. at 423 (argument for the United States) *with id.* at 433-34 (opinion of the Court). That is because such regulation is, and always has been, the province of the several States; and the Tenth Amendment and fundamental principles of comity dictate that the federal-state balance not be altered in this regard. The federal government has no more rightful place prohibiting the taking of red wolves in North Carolina, where such activity is expressly authorized by state law, than it has regulating the deer-hunting season in Virginia or the ability to fish in

Alaska's intrastate waters. Regulation of wild animals, including human interactions with animals on private property, remains a matter of state concern that is outside the powers conferred on Congress. As a result, the red wolf regulation cannot be sustained as a valid exercise of federal authority. *See Morrison*, 120 S. Ct. at 1748; *Lopez*, 514 U.S. at 567-68.

4. This case is not an attack on the entire scheme of federal environmental regulation. Indeed, the red wolf regulation is not even essential to the continuation of the species *Canis rufus*, or any other. *See* 16 U.S.C. § 1539(j)(2)(B). Judge Luttig correctly explained the narrowness of the issues in this case:

> While it could be lost in a reading of the majority opinion, we do not address here Congress' power over either the channels or instrumentalities of interstate commerce. We do not address activity that is interstate in character. We do not address in this case a statute or a regulation with an express interstate commerce jurisdictional requirement, which would all but ensure constitutional validity. We do not have before us an activity that has obvious economic character and impact, such as is typically the case with non-wildlife natural resources, and even with other wildlife resources. We are not even presented with an activity as to which a plausible case of future economic character and impact can be made.
>
> To the contrary, we are confronted here with an administrative agency regulation of an activity that implicates but a handful of animals, if even that, in one small region of one state. An activity

> that not only has no current economic character, but one that concededly has had no economic character for well over a century now. . . . And, importantly, an activity that Congress could plainly regulate under its spending power and under its power over federal lands, regardless.

App., *infra*, 52a-53a.

Even after *Lopez* and *Morrison*, there is significant disagreement over the extent to which the Commerce Clause confers authority upon the federal government to regulate wholly intrastate, noncommercial activities that may impact wildlife. Prompt resolution of this important and recurring issue is necessary to give lower courts much-needed guidance.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, No. 99-1178, and then remanded to the court of appeals for further consideration in light of the Court's resolution of the Commerce Clause issue in that case. In the event the Court does not reach the constitutional question in *SWANCC*, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 24, 2000.

APPENDIX

No. 99-1218

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHARLES GILBERT GIBBS; RICHARD LEE MANN, III; HYDE COUNTY, NORTH CAROLINA; WASHINGTON COUNTY, NORTH CAROLINA,

Plaintiffs-Appellants,

v.

BRUCE BABBITT, Secretary of the Interior, in his official capacity; UNITED STATES FISH AND WILDLIFE SERVICE; UNITED STATES DEPARTMENT OF THE INTERIOR; JAMIE CLARK, Director of the U.S. Fish and Wildlife Service,

Defendants-Appellees,

DEFENDERS OF WILDLIFE,

Intervenor-Appellee.

PACIFIC LEGAL FOUNDATION; NATIONAL WILDERNESS INSTITUTE; WASHINGTON LEGAL FOUNDATION; THE ALLIED EDUCATION FOUNDATION; NATIONAL WILDLIFE FEDERATION; NORTH CAROLINA WILDLIFE FEDERATION; ENVIRONMENTAL DEFENSE FUND; WORLD WILDLIFE FUND; CENTER FOR MARINE CONSERVATION,

Amici Curiae.

Decided June 6, 2000

WILKINSON, Chief Judge:

In this case we ask whether the national government can act to conserve scarce natural resources of value to our entire country. Appellants challenge the constitutionality of a Fish and Wildlife Service regulation that limits the taking of red wolves on private land. The district court upheld the regulation as a valid exercise of federal power under the Commerce Clause. We now affirm because the regulated activity substantially affects interstate commerce and because the regulation is part of a comprehensive federal program for the protection of endangered species. Judicial deference to the judgment of the democratic branches is therefore appropriate.

I.

A.

In response to growing concern over the extinction of many animal and plant species, Congress enacted the Endangered Species Act of 1973 (ESA), Pub. L. 93-205, 81 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-44 (1994 & Supp. III 1997)). Congress found that many of the species threatened with extinction are of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3) (1994). Congress also found that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation." *Id.* § 1531(a)(1). To address these national concerns, the ESA sets forth a comprehensive regulatory scheme to conserve these species and the ecosystems upon which they depend. The Act

provides, *inter alia*, for the listing of "endangered" and "threatened" species, *id.* § 1533, and various recovery plans for the "conservation and survival" of listed species, *id.* § 1533(f).

The cornerstone of the statute is section 9(a)(1), which prohibits the taking of any endangered species without a permit or other authorization. *Id.* § 1538(a)(1)(B). The term "take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). The ESA also authorizes the Fish and Wildlife Service (FWS) to issue any necessary regulations for the conservation of threatened species. *Id.* § 1533(d). Finally, in keeping with its commitment to species conservation, the ESA states that a state law may be more restrictive than the provisions of the Act, but not less. *Id.* § 1535(f).

In order to increase the Service's flexibility in reintroducing endangered species into portions of their historic range, Congress extensively amended the ESA in 1982, Pub. L. 97-304, 96 Stat. 1426. Prior to 1982, reintroduced species were treated the same as any other endangered species. *See id.* § 1536 & 1538(a) (providing for stringent consultation and reporting requirements and a near absolute prohibition on the taking of endangered species). These strict limits led to significant local opposition to the reintroductions. In response to these problems, Congress added section 10(j), which allows the FWS to designate as "experimental" some reintroduced populations of endangered or threatened species. *Id.* § 1539(j). Under the looser standards of section 10(j), members of an experimental population are generally to be treated as threatened rather than endangered.

Id. § 1539(j)(2)(C). This means that protective regulations may be established for their conservation. *See id.* at 1533(d). By promulgating special rules for an experimental population the Service can determine which prohibitions and exceptions shall apply. *See* 50 C.F.R. § 17.82 (1998).

A population may be designated as "experimental" only after the Service determines that it is not "essential" to the continuation of the species. *Id.* § 1539(j)(2)(B). An experimental population located on private land can be exempt from some of the more stringent requirements for endangered species. *See id.* § 1539(j)(2)(C)(i). If a population is found to be "non-essential" and is designated as "experimental," the FWS can develop "special regulations for each experimental population that will address the particular needs of that population." H.R. Rep. No. 97-567, at 34 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2834. Furthermore, "there will be instances where the regulations allow for the incidental take of experimental populations." *Id.* Thus, under section 10(j), the FWS has the authority to promulgate regulations allowing the taking of experimental reintroduced populations under limited circumstances.

B.

The red wolf, *Canis rufus*, is an endangered species whose protection is at issue in this case. The red wolf was originally found throughout the southeastern United States. It was once abundant in the "riverine habitats of the southeast," and was especially numerous near the "canebrakes" that harbored large populations of swamp and marsh rabbits, the primary prey of the red wolf. 51 Fed. Reg. 41,790, 41,791 (1986). The FWS found that "the demise of the red wolf was directly related to man's

activities, especially land changes, such as the drainage of vast wetland areas for agricultural purposes . . . and predator control efforts at the private, State, and Federal levels." *Id.*

Activities such as wetlands drainage, dam construction, and hunting reduced the red wolf to such meager numbers that it was listed as endangered in 1976. *See* 32 Fed. Reg. 4001 (1976). Because of the paucity of animals left in the wild, their poor physical condition, and the threats posed by inbreeding, the FWS decided to trap the remaining red wolves in the mid-1970s and place them in a captive breeding program. *See* 51 Fed. Reg. at 41,791. The breeding program anticipated the eventual reintroduction of some red wolves into the wild. *Id.*

In 1986, the FWS issued a final rule outlining a reintroduction plan for red wolves in the 120,000-acre Alligator River National Wildlife Refuge in eastern North Carolina. *See* 51 Fed. Reg. 41,790. This area was judged the ideal habitat within the red wolf's historic range. *Id.* at 41,791. Between 1987 and 1992, a total of 42 wolves were released in the Refuge. In 1993, the reintroduction program was expanded to include the release of red wolves in the Pocosin Lakes National Wildlife Refuge in Tennessee. Since reintroduction, some red wolves have wandered from federal refuges onto private property. From available data, as of February 1998 it was estimated that about 41 of the approximately 75 wolves in the wild may now reside on private land.[1]

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[1] The Service notes that the red wolf population lies between 53 and 101 wolves, and estimates that the actual population

[Footnote continued on next page]

This case raises a challenge to 50 C.F.R. § 17.84(c), a regulation governing the experimental populations of red wolves reintroduced into North Carolina and Tennessee pursuant to section 10(j). The FWS has extended the takings prohibitions of section 9(a)(1) to the experimental red wolf populations with certain exceptions. *See* 50 C.F.R. § 17.84(c) (1998). As noted above, the taking provision of section 9(a)(1) prevents landowners from harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting any endangered species. *See* 16 U.S.C. § 1532(19). However, in order to insure that other agencies and the public would accept the proposed reintroduction, the FWS relaxed the taking standards for wolves found on private land under its authority over experimental populations.

Section 17.84(c) allows a person to take red wolves on private land "provided that such taking is not intentional or willful, or is in defense of that person's own life or the lives of others." *Id.* § 17.84(c)(4)(i). Private landowners may also take red wolves on their property "when the wolves are in the act of killing livestock or pets, Provided that freshly wounded or killed livestock or pets are evident." *Id.* § 17.84(c)(4)(iii). A landowner may also "harass red wolves found on his or her property . . . Provided that all such harassment is by methods that are not lethal or injurious to the red wolf." *Id.* § 17.84(c)(4)(iv). Finally, landowners may take red

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[Footnote continued from previous page]
is between 70 and 80 animals. The district court also found that approximately 75 red wolves were living in the wild in eastern North Carolina. *See Gibbs v. Babbitt*, 31 F. Supp. 2d 531, 534 (E.D.N.C. 1998).

wolves after efforts by Service personnel to capture such animals have been abandoned, and such taking has been approved in writing. *Id.* § 17.84(c)(4)(v). All of these exceptions to the taking prohibition are subject to a 24-hour reporting requirement. *Id.* § 17.84(c)(4).

C.

In October 1990, plaintiff Richard Lee Mann shot a red wolf that he feared might threaten his cattle. The federal government prosecuted Mann under § 17.84(c), and Mann pled guilty. Mann's prosecution triggered some opposition to the red wolf program in the surrounding communities. After the program was in place for several years, the FWS held meetings with local governments and the public to receive feedback about the reintroductions. The Service contended that most people who commented expressed support for the program and that the reintroductions were generally supported by local, state and federal agencies, and elected officials. *See* 58 Fed. Reg. 62,086, 62,088 (1993). In addition, owners of nearly 200,000 acres of private land have permitted red wolves onto their land through agreements with the FWS. Nonetheless, Hyde and Washington Counties, and the towns of Belhaven and Roper, passed resolutions opposing the reintroduction of the wolves. The resolutions appeared to be based on the farming community's fears of prohibitions on private land use. *Id.*

In response to discontent with the reintroduction program, the North Carolina General Assembly passed a bill entitled "An Act to Allow the Trapping and Killing of Red Wolves by Owners of Private Land." The Act makes it lawful to kill a red wolf on private property if the landowner has previously requested the FWS to re-

move the red wolves from the property. *See* 1994 N.C. Sess. Laws Ch. 635, amended by 1995 N.C. Sess. Laws Ch. 83 (adding Beaufort and Craven Counties to the Act, which initially covered only Hyde and Washington Counties). This law facially conflicts with the federal regulation. For instance, § 17.84(c) allows the taking of red wolves "when the wolves are in the act of killing livestock or pets," when wounded or dead livestock or pets are evident and the taking is reported within 24 hours. *See* 50 C.F.R. § 17.84(c)(4)(iii). By contrast, the North Carolina statute makes it lawful to kill a red wolf on private property when the landowner "reasonably believes" that the wolf may be a threat to people or livestock and the "landowner has previously requested the [FWS] to remove the red wolves from the landowner's property." *See* 1994 N.C. Sess. Laws Ch. 635, § 1. The government reports, however, that no actual conflicts between these laws have arisen, because there have been no contested state or federal prosecutions for unlawful takes since the North Carolina statute was enacted.

Appellants Charles Gibbs, Richard Mann, Hyde County, and Washington County filed the instant action challenging the federal government's authority to protect red wolves on private land. They seek a declaration that the anti-taking regulation, 50 C.F.R. § 17.84(c), as applied to the red wolves occupying private land in eastern North Carolina, exceeds Congress's power under the interstate Commerce Clause, U.S. Const. art. I, § 8, cl. 3 ("Congress shall have Power . . . To regulate Commerce . . . among the several States . . ."). Appellants also seek an injunction against continued enforcement of the anti-taking regulation on non-federal land. Appellants claim

that the red wolves have proven to be a "menace to citizens and animals in the Counties." They further allege that because of the federal regulatory protections surrounding the wolves, North Carolinians cannot effectively defend their property.

On cross-motions for summary judgment, the United States District Court for the Eastern District of North Carolina held that Congress's power to regulate interstate commerce includes the power to regulate conduct that might harm red wolves on private land. *See Gibbs v. Babbitt*, 31 F. Supp. 2d 531 (E.D.N.C. 1998). The district court found that the red wolves are "things in interstate commerce" because they have moved across state lines and their movement is followed by "tourists, academics, and scientists." *Id.* at 535. The court also found that the tourism they generate substantially affects interstate commerce. *See id.* The private landowners and North Carolina Counties now appeal.

II.

We consider this case under the framework articulated by the Supreme Court in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 120 S. Ct. 1740, 2000 WL 574361 (2000), *aff'g Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820 (4th Cir. 1999). While Congress's power to pass laws under the Commerce Clause has been interpreted broadly, both *Lopez* and *Morrison* reestablish that the commerce power contains "judicially enforceable outer limits." *See Lopez*, 514 U.S. at 566; *Morrison*, 2000 WL 574361, at *6. It is essential to our system of government that the commerce power not extend to effects on interstate commerce that are so remote that we "would effectually obliterate the distinction between

what is national and what is local." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). Indeed, the judiciary has the duty to ensure that federal statutes and regulations are promulgated under one of the enumerated grants of constitutional authority. It is our further duty to independently evaluate whether "a rational basis exists for concluding that a regulated activity sufficiently affects interstate commerce." *Lopez*, 514 U.S. at 557.

While this is rational basis review with teeth, the courts may not simply tear through the considered judgments of Congress. Judicial restraint is a long and honored tradition and this restraint applies to Commerce Clause adjudications. "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *Morrison*, 2000 WL 574361, at *6. In fact, "the substantial element of political judgment in Commerce Clause matters leaves our institutional capacity more in doubt than when we decide cases, for instance, under the Bill of Rights." *Lopez*, 514 U.S. at 579 (Kennedy, J., concurring). We must enforce the structural limits of Our Federalism, but we must also defer to the political judgments of Congress, recognizing that the "Commerce Clause represents a broad grant of federal authority." *Brzonkala v. Virginia Polytechnic Instit. and State Univ.*, 169 F.3d 820, 830 (4th Cir. 1999), *aff'd sub nom. Morrison*, 2000 WL 574361.

The *Lopez* Court recognized three broad categories of activity that Congress may regulate under its commerce power. 514 U.S. at 558. "First, Congress may regulate the use of the channels of interstate commerce.

Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558-59 (citations omitted).

Section 17.84(c) is "not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce." *Lopez*, 514 U.S. at 559. The term "channel of interstate commerce" refers to, *inter alia*, "navigable rivers, lakes, and canals of the United States; the interstate railroad track system; the interstate highway system; . . . interstate telephone and telegraph lines; air traffic routes; television and radio broadcast frequencies." *United States v. Miles*, 122 F.3d 235, 245 (5th Cir. 1997). This regulation of red wolf takings on private land does not target the movement of wolves or wolf products in the channels of interstate commerce.

This case also does not implicate *Lopez*'s second prong, which protects things in interstate commerce. Although the Service has transported the red wolves interstate for the purposes of study and the reintroduction programs, this is not sufficient to make the red wolf a "thing" in interstate commerce. *See, e.g., Lopez*, 514 U.S. at 559 (rejecting application of prong two to Gun-Free School Zones Act, despite the fact that the regulated guns likely traveled through interstate commerce); *National Assoc. of Home Builders v. Babbitt*, 130 F.3d

1041, 1046 (D.C. Cir. 1997) ("NAHB") (rejecting notion that Delhi Sands Flower-Loving Fly was a "thing" in interstate commerce). Therefore, if 50 C.F.R. § 17.84(c) is within the commerce power, it must be sustained under the third prong of *Lopez*.

Under the third *Lopez* test, regulations have been upheld when the regulated activities "arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561. In *Morrison*, the Supreme Court noted, "In every case where we have sustained federal regulation under Wickard's aggregation principle, the regulated activity was of an apparent commercial character." *Morrison*, 2000 WL 574361, at *37 n.4. The Court in *Lopez* likewise placed great emphasis on the "commercial concerns that are central to the Commerce Clause." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); *see also Hoffman v. Hunt*, 126 F.3d 575, 586-87 (4th Cir. 1997) (noting the importance of the distinction between "the regulation of, on the one hand, those activities that are commercial or economic in nature . . . and, on the other hand, those activities that are not").

Although the connection to economic or commercial activity plays a central role in whether a regulation will be upheld under the Commerce Clause, economic activity must be understood in broad terms. Indeed, a cramped view of commerce would cripple a foremost federal power and in so doing would eviscerate national authority. The *Lopez* Court's characterization of the regulation of home-grown wheat in *Wickard v. Filburn*, 317 U.S. 111 (1942), as a case involving economic activity makes clear the breadth of this concept. The Court

explained that "even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not." *Lopez*, 514 U.S. at 560; *accord Morrison*, 2000 WL 574361, at *7. *See also Brzonkala*, 169 F.3d at 835 (explaining that the Court has a "relatively broad understanding of such [economic] activity"). In fact, our understanding of commerce may not be limited to its "18th-century" forms. *See Lopez*, 514 U.S. at 574 (Kennedy, J., concurring). While we must enforce meaningful limits on the commerce power, we must also be mindful of the "Court's relatively generous conception of economic activity." *Brzonkala*, 169 F.3d at 835.

Lopez and *Morrison* rest on the principle that where a federal statute has only a tenuous connection to commerce and infringes on areas of traditional state concern, the courts should not hesitate to exercise their constitutional obligation to hold that the statute exceeds an enumerated federal power. Respect for our federal system of government was integral to those decisions. *See Lopez*, 514 U.S. at 561 n.3; *Morrison*, 2000 WL 574361, at *11. Yet Lopez also counsels that "where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." 514 U.S. at 560. In enforcing limits on the Congress, we must be careful not to overstep the judicial role. To strike down statutes that bear substantially upon commerce is to overstep our own authority even as we fault Congress for exceeding limits on its power. The irony of disregarding limits on ourselves in the course of enforcing limits upon others will assuredly not be lost on those

who look to courts to respect restraints imposed by rules of law.

With these basic principles in mind, we consider appellants' challenge to § 17.84(c).

III.

Appellants argue that the federal government cannot limit the taking of red wolves on private land because this activity cannot be squared with any of the three categories that Congress may regulate under its commerce power. Appellants assert that 50 C.F.R. § 17.84(c) is therefore beyond the reach of congressional authority under the Commerce Clause.

We disagree. It was reasonable for Congress and the Fish and Wildlife Service to conclude that § 17.84(c) regulates economic activity. The taking of red wolves implicates a variety of commercial activities and is closely connected to several interstate markets. The regulation in question is also an integral part of the overall federal scheme to protect, preserve, and rehabilitate endangered species, thereby conserving valuable wildlife resources important to the welfare of our country. Invalidating this provision would call into question the historic power of the federal government to preserve scarce resources in one locality for the future benefit of all Americans.

A.

To fall within Congress's commerce power, this regulation must have a "substantial relation to interstate commerce"—it must "substantially affect interstate commerce." *Lopez*, 514 U.S. at 559. The Supreme Court recently emphasized that "in those cases where we

have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Morrison*, 2000 WL 574361, at *8. Intrastate activities may be subject to federal regulation if they have a "meaningful connection with a particular, identifiable economic enterprise or transaction." *Brzonkala*, 169 F.3d at 834. We therefore must consider whether the taking of red wolves on private land is "in any sense of the phrase, economic activity." *Morrison*, 2000 WL 574361, at *9.

Unlike the Violence Against Women Act (VAWA) in *Morrison* and the Gun-Free School Zones Act (GFSZA) in *Lopez*, § 17.84(c) regulates what is in a meaningful sense economic activity. The Court in *Morrison* explained that both the VAWA and the GFSZA involved activity that was noneconomic and only tenuously linked to interstate commerce. 2000 WL 574361, at *7-9. Yet the taking of a red wolf on private land is unlike gender-motivated violence or guns near schools. The protection of commercial and economic assets is a primary reason for taking the wolves. Farmers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops. Indeed, appellants' arguments focus quite explicitly on these economic concerns—they want freer rein to protect their property and investments in the land. *See* Appellants' Br. at 10 ("In the face of these threats [from red wolves], North Carolinians cannot effectively defend their property."); *id.* at 12.

The relationship between red wolf takings and interstate commerce is quite direct—with no red wolves, there will be no red wolf related tourism, no scientific

research, and no commercial trade in pelts. We need not "pile inference upon inference," *Lopez*, 514 U.S. at 567, to reach this conclusion. While a beleaguered species may not presently have the economic impact of a large commercial enterprise, its eradication nonetheless would have a substantial effect on interstate commerce. And through preservation the impact of an endangered species on commerce will only increase.[2]

Because the taking of red wolves can be seen as economic activity in the sense considered by *Lopez* and *Morrison*, the individual takings may be aggregated for the purpose of Commerce Clause analysis. *See Morrison*, 2000 WL 574361, at *37 n.4. While the taking of one red wolf on private land may not be "substantial," the takings of red wolves in the aggregate have a sufficient impact on interstate commerce to uphold this regulation. This is especially so where, as here, the regulation is but one part of the broader scheme of endangered species legislation.

Further, § 17.84(c) is closely connected to a variety of interstate economic activities.[3] Whether the impact

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[2] While the regulation might also reflect a moral judgment concerning the importance of rehabilitating endangered species, this does not undermine the economic basis for the regulation. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) ("Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.").

[3] The Supreme Court has admonished us that "the task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that

[Footnote continued on next page]

of red wolf takings on any one of these activities qualifies as a substantial effect on interstate commerce is something we need not address. We have no doubt that the effect of the takings on these varied activities in combination qualifies as a substantial one. The first nexus between the challenged regulation and interstate commerce is tourism. The red wolves are part of a $29.2 billion national wildlife-related recreational industry that involves tourism and interstate travel. *See Heart of Atlanta Motel*, 379 U.S. at 256 (finding it is well-established that "commerce among the States . . . consists of intercourse and traffic between their citizens" (internal quotation marks omitted)). Many tourists travel to North Carolina from throughout the country for "howling events"—evenings of listening to wolf howls accompanied by educational programs. These howlings are a regular occurrence at the Alligator River National Wildlife Refuge. According to a study conducted by Dr. William E. Rosen of Cornell University, the recovery of the red wolf and increased visitor activities could result in a significant regional economic impact. *See* William E. Rosen, *Red Wolf Recovery in Northeastern North Carolina and the Great Smoky Mountains National Park: Public Attitudes and Economic Impacts* (unpublished, Joint Appendix at 633). Rosen estimates that northeastern North Carolina could see an increase of between $39.61 and $183.65 million per year in tourism-related activities, and that the Great Smoky Mountains National Park could see an increase of between $132.09

[Footnote continued from previous page]
a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 276 (1981).

and $354.50 million per year. This is hardly a trivial impact on interstate commerce. Appellants understandably seek to criticize the Rosen study, but concede that the howling events attract interstate tourism and that red wolf program volunteers come from all around the country.

While there are no formal congressional findings that the ESA affects interstate commerce, such findings are neither necessary nor sufficient to sustain a statute or regulation. In *Lopez*, the Court said that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." 514 U.S. at 562; *see also Perez v. United States*, 402 U.S. 146, 156 (1971) (particularized findings are not necessary for Congress to legislate). Further, in *Morrison*, the Court emphasized in the face of voluminous congressional findings that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." 2000 WL 574361, at *10.

In evaluating whether there is a rational basis for the promulgation of a statute or regulation under the commerce power, we often consider congressional committee findings. *See Lopez*, 514 U.S. at 562. Here, Congress has provided numerous sources of informal findings. Committee reports and legislative debates have emphasized the importance of endangered species to interstate commerce. We independently evaluate the constitutionality of this regulation, but we also take account of congressional judgment and the judgment of the agency designated to implement the statute.

Appellants argue that the tourism rationale relates only to howling events on national park land or wildlife

refuges because people do not travel to private land. They reason that without tourism on private land the regulated activity does not substantially affect interstate commerce. Yet this argument misses the mark. Since reintroduction, red wolves have strayed from federal lands onto private lands. Indeed, wolves are known to be "great wanderers." *See* 60 Fed. Reg. 18,940, 18,943 (1995). In 1998, it was estimated that 41 of the 75 wolves in the wild now live on private land. Because so many members of this threatened species wander on private land, the regulation of takings on private land is essential to the entire program of reintroduction and eventual restoration of the species. Such regulation is necessary to conserve enough red wolves to sustain tourism. Appellants in fact seem unmindful of the history of endangered species regulation. The Endangered Species Acts of 1966 and 1969 initially targeted conservation efforts only on federal lands, but they met with limited success. *See* Note, *Evolution of Wildlife Legislation in the United States: An Analysis of the Legal Efforts to Protect Endangered Species and the Prospects for the Future*, 5 Geo. Int'l Envtl. L. Rev. 441, 449-53 (1993). The Endangered Species Act of 1973 was motivated in part by the need to extend takings regulation beyond the limited confines of federal land. *See id.* at 556. The prohibition of takings on private land was critical to the overall success of the ESA in halting and reversing the near extinction of numerous species. *See* 16 U.S.C. § 1538(a)(1). The success of many commercial enterprises depends on some regulation of activity on private land, and interstate tourism is no exception.

Tourism, however, is not the only interstate commercial activity affected by the taking of red wolves. The

regulation of red wolf takings is also closely connected to a second interstate market—scientific research. Scientific research generates jobs. It also deepens our knowledge of the world in which we live. The red wolf reintroduction program has already generated numerous scientific studies. For example, the red wolf is used as a model for other carnivore reintroductions. *See* Donald E. Moore III & Roland Smith, *The Red Wolf as a Model for Carnivore Re-introductions*, 62 Symp. Zool. Soc. Lond. 263 (1990). Scientists have also studied how the red wolf affects small mammal populations and how the wolves interact with the ecosystem as a whole. *See, e.g.*, Bryan T. Kelly, *Alligator River National Wildlife Refuge Red Wolf (Canis Rufus) Scat Analysis: Preliminary Analyses of Mammalian Prey Consumed by Year, Season, Pack, Sex, and Age* (April 1994) (unpublished, Joint Appendix at 942). By studying the effects of red wolves on the ecosystem, scientists learn about the interdependence of plants and animals, as well as how other threatened species may be reintroduced in the future. Scientific research can also reveal other uses for animals—for instance, approximately 50 percent of all modern medicines are derived from wild plants or animals. *See* Norman Myers, *A Wealth of Wild Species: Storehouse for Human Welfare* 4 (1983). Protection of the red wolves on private land thus encourages further research that may have inestimable future value, both for scientific knowledge as well as for commercial development of the red wolf.

The anti-taking regulation is also connected to a third market—the possibility of a renewed trade in fur pelts. Wolves have historically been hunted for their pelts. *See* Stanley P. Young & Edward A. Goldman, *The*

Wolves of North America I, 165-70 (1964). Congress had the renewal of trade in mind when it enacted the ESA. The Senate Report noted that the protection of an endangered species "may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed. In such a case businessmen may profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels." S. Rep. No. 91-526, at 3 (1969), reprinted in 1969 U.S.C.C.A.N. 1413, 1415. The American alligator is a case in point. In 1975, the American alligator was nearing extinction and listed as endangered, but by 1987 conservation efforts restored the species. Now there is a vigorous trade in alligator hides. *See* Catharine L. Krieps, *Sustainable Use of Endangered Species Under CITES: Is it a Sustainable Alternative?*, 17 U. Pa. J. Int'l Econ. L. 461, 479-80 (1996) (explaining that many environmentalists are now encouraging the purchase of alligator products to create an incentive for protecting alligators and their habitats). Although alligator hides have more recently been a part of interstate commercial trade and red wolves were sold for their pelts primarily in the nineteenth century, this temporal difference is beside the point. It is not for the judiciary to move from species to species, opining that species A possesses great commercial potential, but species B does not. Assessing the relative scientific value and commercial impact of alligators and red wolves is for Congress and the FWS, informed as they are by biologists, economists, and others whose expertise is best delivered to the political branches, not the courts.

Finally, the taking of red wolves is connected to interstate markets for agricultural products and livestock. For instance, appellant landowners find red wolves a menace because they threaten livestock and other animals of economic and commercial value. By restricting the taking of red wolves, § 17.84(c) is said to impede economic development and commercial activities such as ranching and farming. This effect on commerce, however, still qualifies as a legitimate subject for regulation. It is well-settled under Commerce Clause cases that a regulation can involve the promotion or the restriction of commercial enterprises and development. Indeed, "the motive and purpose of a regulation of interstate commerce are matters for the legislative judgment." *United States v. Darby*, 312 U.S. 100, 115 (1941). We recognize that "Congress can regulate interstate commerce for any lawful motive." *United States v. Soderna*, 82 F.3d 1370, 1374 (7th Cir. 1996). The regulation here targets takings that are economically motivated—farmers take wolves to protect valuable livestock and crops. It is for Congress, not the courts, to balance economic effects—namely whether the negative effects on interstate commerce from red wolf predation are outweighed by the benefits to commerce from a restoration of this species. To say that courts are ill-suited for this act of empirical and political judgment is an understatement.

It is anything but clear, for example, that red wolves harm farming enterprises. They may in fact help them, and in so doing confer additional benefits on commerce. For instance, red wolves prey on animals like raccoons, deer, and rabbits—helping farmers by killing the animals that destroy their crops. *See* Robert J. Esher &

Theodore R. Simons, R*ed Wolf Propagation on Horn Island, Miss.: Red Wolf Ecological Studies* 13-16 (Sept. 1993) (unpublished, Joint Appendix at 890). On Horn Island, for instance, researchers found evidence of increased shore bird nesting, likely due to the reduction in raccoon predation. *See id.* at 15. In *Tennessee Valley Authority v. Hill ("TVA")*, the Supreme Court recognized that one of Congress's primary concerns in enacting the ESA was "the unknown uses that endangered species might have and about the unforeseeable place such creatures may have in the chain of life on this planet." 437 U.S. 153, 178-79 (1978). It is within the power of Congress to regulate the coexistence of commercial activity and endangered wildlife in our nation and to manage the interdependence of endangered animals and plants in large ecosystems. It is irrelevant whether judges agree or disagree with congressional judgments in this contentious area. Given the existing economic and commercial activity involving red wolves and wildlife generally, Congress could find that conservation of endangered species and economic growth are mutually reinforcing. It is simply not beyond the power of Congress to conclude that a healthy environment actually boosts industry by allowing commercial development of our natural resources.

Section 17.84(c) aims to reverse threatened extinction and conserve the red wolf for both current and future use in interstate commerce. Congress is entitled to make the judgment that conservation is potentially valuable, even if that value cannot be presently ascertained. The Supreme Court has held that the congressional decision to maintain abandoned railroad track is reasonable "even if no future rail use for it is currently foreseeable."

Preseault v. ICC, 494 U.S. 1, 19 (1990). The Court reasoned that "given the long tradition of congressional regulation of railroad abandonments, that is a judgment that Congress is entitled to make." *Id.* (citations omitted). Similarly, Congress has long been involved in the regulation of scarce and vital natural resources. The full payoff of conservation in the form of tourism, research, and trade may not be foreseeable. Yet it is reasonable for Congress to decide that conservation of species will one day produce a substantial commercial benefit to this country and that failure to preserve a species will result in permanent, though unascertainable, commercial loss.

When enacting the ESA, various legislators expressed these exact concerns, namely that species be conserved for future scientific development:

> The value of this genetic heritage is, quite literally, incalculable. . . . From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. . . . Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? . . . Sheer self-interest impels us to be cautious.

H.R. Rep. No. 93-412, at 4-5 (1973). Extinction, after all, is irreversible. If a species becomes extinct, we are left to speculate forever on what we might have learned or what we may have realized. If we conserve the species, it will be available for the study and benefit of future generations. In any event, it is for Congress to

choose between inaction and preservation, not for the courts.

Courts have uniformly upheld endangered species legislation after *Lopez* based on many of the same current and future connections to interstate commerce articulated here. In fact, no case has been brought to our attention that invalidates any endangered species regulation for exceeding the commerce power. In addressing a post-*Lopez* challenge to the constitutionality of the Bald Eagle Protection Act, 16 U.S.C. § 668 (1994), the Ninth Circuit found that "extinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity: future commerce in eagles or their parts; future interstate travel for the purpose of observing or studying eagles; or future commerce in beneficial products derived either from eagles or from analysis of their genetic material." *United States v. Bramble*, 103 F.3d 1475, 1481 (9th Cir. 1996). Similarly, "given the interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species . . . will therefore substantially affect land and objects that are involved in interstate commerce." *See NAHB*, 130 F.3d at 1059 (Henderson, J., concurring). In addition, the District of Columbia District Court upheld application of the ESA to the fairy shrimp, a severely endangered species limited to one state. *See Building Indus. Assoc. of Superior Cal. v. Babbitt*, 979 F. Supp. 893 (D.D.C. 1997). The court declined to "read *Lopez* as hamstringing Congress in such an irrational fashion in a regulatory area of such important economic, scientific and environmental dimensions." *Id.* at 908. Pre-*Lopez*

cases reached similar results. *See, e.g., Hoffman Homes, Inc. v. Administrator*, 999 F.2d 256, 261 (7th Cir. 1993); *Palila v. Hawaii Dep't of Land and Natural Resources*, 471 F. Supp. 985, 995 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

The protection of the red wolf on both federal and private land substantially affects interstate commerce through tourism, trade, scientific research, and other potential economic activities. To overturn this regulation would start courts down the road to second-guessing all kinds of legislative judgments. There is a "rational basis" as defined by *Lopez* for sustaining this regulation. We therefore hold that the anti-taking provision at issue here involves regulable economic and commercial activity as understood by current Commerce Clause jurisprudence.[4]

B.

This regulation is also sustainable as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. The Supreme Court in *Hodel v. Indiana* stated: "A complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that

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[4] Intervenor-appellees Defenders of Wildlife argue that this regulation can also be upheld under the treaty power. *See* U.S. Const. art. VI., cl. 2; U.S. Const. art. II, § 2, cl. 2. Because we hold that § 17.84(c) is valid under the Commerce Clause, we need not address this alternative argument.

the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test." 452 U.S. 314, 329 n.17 (1981).

The FWS issued this regulation pursuant to the provisions of the Endangered Species Act, a comprehensive and far-reaching piece of legislation that aims to conserve the health of our national environment. Congress undoubtedly has the constitutional authority to pass legislation for the conservation of endangered species. *See Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995) (presupposing validity of Endangered Species Act in upholding broad definition of "harm" as including significant habitat modification); *see also TVA v. Hill*, 437 U.S. at 194 (emphasizing that Congress has struck a balance in "favor of affording endangered species the highest of priorities" and upholding application of the ESA because "once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end").

Appellants repeatedly argue that individual takings of red wolves have only an insubstantial effect on interstate commerce and therefore that the application of the regulation to private landowners is invalid. But we emphasize that the effect on commerce must be viewed not from the taking of one wolf, but from the potential commercial differential between an extinct and a recovered species. A single red wolf taking may be insubstantial by some measures, but that does not invalidate a regulation that is part of the ESA and that seeks conservation not only of any single animal, but also recovery of the species as a whole. The Supreme Court in *Lopez* was emphatic on this point: "'where a general regulatory

statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.'" 514 U.S. at 558 (alteration in original) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)); *see also Perez v. United States*, 402 U.S. 146, 154 (1971) ("Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." (internal quotation marks omitted)).

Once a species has been designated as endangered, there are by definition only a few remaining animals. Therefore, the effects on interstate commerce should not be viewed from the arguably small commercial effect of one local taking, but rather from the effect that single takings multiplied would have on advancing the extinction of a species. Each taking impacts the overall red wolf population, which has an effect on many dimensions of commerce between the states. As the Supreme Court has stated, "if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *Heart of Atlanta Motel*, 379 U.S. at 258 (internal quotation marks omitted). Section 17.84(c) must thus be evaluated against the overall congressional goal of restoring red wolves and endangered species generally. It would be perverse indeed if a species nearing extinction were found to be beyond Congress's power to protect while abundant species were subject to full federal regulatory power. Yet under appellants' theory, the more endangered the species, the less authority Congress has to regulate the taking of it. According to this view, endangered species would lie beyond congressional protection because there are too

few animals left to make a commercial difference. Such reasoning would eviscerate the comprehensive federal scheme for conserving endangered species and turn congressional judgment on its head.

Appellants protest they do not ask us to overturn the ESA. They simply want us to excise as unconstitutional a disfavored provision that places a strain on their agricultural activities. But given that Congress has the ability to enact a broad scheme for the conservation of endangered species, it is not for the courts to invalidate individual regulations. If appellants think this regulation unwise, they must make their plea to Congress. The judiciary lacks the delegated powers of the FWS or the Environmental Protection Agency. Separation of powers principles mandate that we leave decisions such as these to Congress and to agencies with congressionally sanctioned expertise and authority. The Supreme Court itself has been mindful of the "degree of regulatory expertise necessary to [the ESA's] enforcement." *Sweet Home*, 515 U.S. at 703. Lacking such expertise, we must decide not whether the regulation meets with judicial favor, but whether it passes constitutional muster.

The specific needs of individual species, as well as the balance to be struck with landowners in or near the species' habitats, present a classic case for legislative balancing. Here § 17.84(c) was promulgated precisely so that private landowners could take red wolves under certain circumstances. For instance, subject to certain reporting requirements, landowners can "take" wolves in self-defense, *see* 50 C.F.R. § 17.84(c)(4)(i), or when the wolves are found in the act of killing livestock or pets, *see id.* § 17.84(c)(4)(iii). Landowners can also harass wolves found on private property, provided that harass-

ment is by methods that are not lethal or physically injurious to the red wolf, *see id.* § 17.84(c)(4)(iv). These provisions may ease tensions between the red wolves and private landowners. Without these special regulations, all red wolves would be subject to the absolute taking prohibition of section 9(a), placing a much greater burden on the property owner. Congress and the Service have decided that these experimental wolves can be taken under certain circumstances based on an evaluation of competing interests. How these lines should be drawn and this balance struck is grist for the legislative and administrative mill and beyond the scope of judicial competence.

IV.

Upholding this regulation is consistent with the "first principles" of a Constitution that establishes a federal government of enumerated powers. *See Lopez*, 514 U.S. at 552. *Lopez* and *Morrison* properly emphasize that we must carefully evaluate legislation in light of our federal system of government. "The Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 2000 WL 574361, at *11. We must particularly scrutinize regulated activity that "falls within an area of the law where States historically have been sovereign and countenance of the asserted federal power would blur the boundaries between the spheres of federal and state authority." *Brzonkala*, 169 F.3d at 837 (internal quotation marks omitted).

A.

It is imperative to set forth at the outset the historic roles of federal and state authority in this area. The regulated activity at issue here does not involve an "area

of traditional state concern," one to which "States lay claim by right of history and expertise." *Lopez*, 514 U.S. at 580, 583 (Kennedy, J., concurring).

Appellants argue that the regulation infringes on the traditional state control over wildlife. We are cognizant that states play a most important role in regulating wildlife—many comprehensive state hunting and fishing laws attest to it. State control over wildlife, however, is circumscribed by federal regulatory power. In *Minnesota v. Mille Lacs Band of Chippewa Indians*, the Supreme Court recently reiterated that "although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers." 526 U.S. 172, 204 (1999). In *Mille Lacs*, the Court upheld Chippewa Indian rights under an 1837 treaty that allowed the Chippewa to hunt, fish, and gather free of territorial, and later state, regulation. *Id.* These Indian treaty rights were found to be "reconcilable with state sovereignty over natural resources." *Id.* at 205.

It is true that in the nineteenth century courts followed the legal precept that wildlife was the property of the state. *See Geer v. Connecticut*, 161 U.S. 519 (1896) (upholding a Connecticut statute that prohibited the interstate transportation of game birds that had been killed within the state). But the principles in *Geer* were modified early in the twentieth century. *See Hughes v. Oklahoma*, 441 U.S. 322, 329 (1979) ("The erosion of *Geer* began only 15 years after it was decided."). *Geer* was finally overruled in 1979 by *Hughes v. Oklahoma*, which held that states do not own the wildlife within

their borders and that state laws regulating wildlife are circumscribed by Congress's commerce power. 441 U.S. at 326, 335. In light of *Mille Lacs* and *Hughes*, the activity regulated by § 17.84(c)—the taking of red wolves on private property—is not an area in which the states may assert an exclusive and traditional prerogative in derogation of an enumerated federal power.

Appellants next argue that the application of this regulation to private land intrudes on the state's traditional police power to regulate local land use. Of course, states and localities possess broad regulatory and zoning authority over land within their jurisdictions. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). It is well established, however, that Congress can regulate even private land use for environmental and wildlife conservation. Courts have consistently upheld Congress's authority to regulate private activities in order to conserve species and protect the environment. For example, in a post-*Lopez* challenge to CERCLA, the Eleventh Circuit held that the private, on-site, intrastate disposal of hazardous waste was within Congress's authority to regulate because such disposal "significantly impacts interstate commerce." *United States v. Olin Corp.*, 107 F.3d 1506, 1510 (11th Cir. 1997). In *Sweet Home*, the Supreme Court upheld a FWS regulation defining "harm" in the Endangered Species Act to include "significant habitat modification." 515 U.S. at 697. The regulation applied equally to private and public land. *See id.* at 692 (challenge brought by small landowners and logging companies). Here, the FWS similarly acted within its authority in determining that conservation of the red wolf population requires prohibiting certain tak-

ings on private land surrounding the refuges. *See* 51 Fed. Reg. 41,790, 41,792-93 (1986).

Given the history of federal regulation over wildlife and related environmental concerns, it is hard to imagine how this anti-taking regulation trespasses impermissibly upon traditional state functions—either control over wildlife or local land use. *Lopez* and *Morrison* properly caution that States should receive judicial protection from unconstitutional federal encroachments on state matters. Yet endangered wildlife regulation has not been an exclusive or primary state function. In this way the anti-taking regulation is distinctly unlike the GFSZA, which forbade the possession of firearms in a school zone. The Supreme Court explained that the regulation of school zones was within the "general police power" retained by the states. *See Lopez*, 514 U.S. at 567. The regulation of red wolf taking is also unlike the VAWA, which established a "right to be free from crimes of violence motivated by gender," 42 U.S.C. § 13981(b) (1994). The Supreme Court found that the VAWA impeded on family law and criminal matters of traditional state concern. *See Morrison*, 2000 WL 574361, at *11. The Court noted, "We can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.* at *11. Unlike the GFSZA and the VAWA, § 17.84(c) does not invade traditional state concerns—it is simply one small part of an ongoing federal effort to preserve the scarcest natural resources for future generations.

In contrast to gender-motivated violence or guns in school yards, the conservation of scarce natural re-

sources is an appropriate and well-recognized area of federal regulation. The federal government has been involved in a variety of conservation efforts since the beginning of this century. In 1900, Congress passed the Lacey Act, which provided penalties for the taking of wildlife in violation of state laws. *See* Act of May 25, 1900, ch. 553, 31 Stat. 187 (codified as amended 16 U.S.C. § 701 (1994)). The Migratory Bird Treaty Act of 1918 forbade all takings of numerous bird species and explicitly preempted state laws. *See* 16 U.S.C. §§ 703-12. Furthermore, Congress has regulated wildlife on nonfederal property through numerous statutes, including the Bald Eagle Protection Act of 1940, which prohibits, *inter alia*, the taking, possession, selling, or exporting of bald eagles or any of their parts. *See* 16 U.S.C. §§ 668-668d (1994). Similarly, the Marine Mammal Protection Act of 1972 regulates the taking of marine mammals and restricts the importing of marine mammals and their products through an elaborate system of permits. *See* 16 U.S.C. §§ 1361-1421h (1994 & Supp. III 1997). The Magnuson Fishery Conservation and Management Act of 1976 provides national standards for fishery conservation and management along with an elaborate system of enforcement. *See* 16 U.S.C. §§ 1801-83 (1994 & Supp. III 1997).

The Supreme Court has repeatedly upheld these statutes and the conservation efforts of Congress with regard to a variety of animal species. In *Missouri v. Holland*, the Court upheld the Migratory Bird Treaty Act as a necessary and proper means of executing Congress's treaty power. The conservation of endangered wildlife, Justice Holmes stated, was a "matter [] of the sharpest exigency for national well being." 252 U.S. 416, 432-33

(1920). In 1977, the Supreme Court held that Congress had the power under the Commerce Clause to grant federal fishing licenses for use in state waters, thereby preempting conflicting state laws. *See Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977). Later in *Andrus v. Allard*, the Court emphasized that the "assumption that the national commerce power does not reach migratory wildlife is clearly flawed." 444 U.S. 51, 63 n.19 (1979).

Post-*Lopez* cases addressing wildlife conservation statutes do not call these cases into question, but rather uphold the exercise of agency power over private land use in order to conserve endangered species. In *Sweet Home*, for example, the Court upheld the Service's broad definition of "harm" in the ESA as including "significant habitat modification." 515 U.S. at 708. The lower courts have followed suit, both before and after *Lopez*. For example, in *United States v. Hartsell*, this court reaffirmed that Congress retains authority to regulate even nonnavigable waters under the Commerce Clause. 127 F.3d 343, 348 & n.1 (4th Cir. 1997). The Ninth Circuit reaffirmed that the Bald Eagle Protection Act is a valid exercise of the commerce power because Congress had a rational basis for concluding that "extinction of the eagle would have a substantial effect on interstate commerce." *See Bramble*, 103 F.3d at 1482. In sum, it is clear from our laws and precedent that federal regulation of endangered wildlife does not trench impermissibly upon state powers. Rather, the federal government possesses a historic interest in such regulation—an interest that has repeatedly been recognized by the federal courts.

B.

It is important not simply to point to the historic fact of federal efforts in the area of resource conservation. Courts have respected the justifications for these federal efforts as well.

The Supreme Court has recognized that protection of natural resources may require action from Congress. This general point holds true where endangered species are concerned. Species conservation may unfortunately impose additional costs on private concerns. States may decide to forego or limit conservation efforts in order to lower these costs, and other states may be forced to follow suit in order to compete. The Supreme Court has held that Congress may take cognizance of this dynamic and arrest the "race to the bottom" in order to prevent interstate competition whose overall effect would damage the quality of the national environment. In *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, the Court upheld provisions of the Surface Mining Control and Reclamation Act of 1977 that regulated intrastate mining activities. 452 U.S. 264 (1981). The Court deferred to a congressional finding that nationwide standards were "essential" to insuring that competition in interstate commerce among sellers of coal would not be used to undermine environmental standards. *See id.* at 281-82. Congress expressed concern that such competition would disable states from improving and maintaining "adequate standards on coal mining operations within their borders." *Id.* (internal quotation marks omitted). The Court emphasized, "The prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause." *Id.* at 282. In *Darby*, the Court upheld a prohibition of the interstate shipment of goods produced in

violation of the Fair Labor Standards Act. 312 U.S. 100. The Court reasoned that "interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions." *Id.* at 115.

A desire for uniform standards also spurred enactment of the ESA: "Protection of endangered species is not a matter that can be handled in the absence of coherent national and international policies: the results of a series of unconnected and disorganized policies and programs by various states might well be confusion compounded." *See* H.R. Rep. No. 93-415, at 5. If we struck down this regulation under the commerce power, we would throw into question much federal environmental legislation. This would be a portentous step, leaving many environmental harms to be dealt with through state tort law. Such a movement might well subject interstate companies to a welter of conflicting obligations. If Congress is constitutionally forbidden from even enacting uniform environmental rules, the confusion for interstate commercial enterprises might increase exponentially.

In examining the justifications for federal action in this area it is important to understand the ESA as a culmination of a long legislative process of trial and error. This font of experience is something courts lack. As we noted earlier, preliminary efforts at endangered species regulation were widely viewed as inadequate precisely because they did not control private activities. The Endangered Species Act of 1966 established a National Wildlife Refuge System and prohibited disturbing animals or habitat within the System. *See* Pub. L. No. 89-669, § 4, 80 Stat. 926. The Endangered Species Act of

1969 required the Secretary of the Interior to develop a list of endangered species, and prohibited the importation of these animals or any of their byproducts without a permit. *See* Pub. L. No. 91-135, § 3(a), § 2, 83 Stat. 275. These statutes also required federal agencies to conserve species "insofar as is practicable," § 1(b), 80 Stat. at 926, and to the "extent practicable," § 3(a), 83 Stat. at 275. In response to concerns that these Acts had little impact, Congress amended the ESA in 1973 to abandon the practicability standards and to prohibit takings on private land. See 16 U.S.C. § 1538. According to the General Accounting Office, in 1993 there were 781 species listed under the ESA—over 90 percent of these species have some or all of their habitat on nonfederal lands. Nearly three-fourths of the listed species had over 60 percent of their habitat on nonfederal lands. Courts cannot simply ignore or negate congressional efforts to devise a more effective solution to a significant national problem.

C.

This regulation does not blur the boundaries between federal and state responsibility for the conservation of species. Disturbing the balance of federal and state power was a primary concern in both *Lopez* and *Morrison*. In *Lopez*, Justice Kennedy argued that one of the great dangers of the federal government regulating areas of traditional state concern is that "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." 514 U.S. at 577 (Kennedy, J., concurring). In *Brzonkala* this court observed that because the VAWA supplemented and interfered with state remedies, "the citizens of the States would not know which sovereign to hold

accountable for any failure to address adequately gender-motivated crimes of violence." 169 F.3d at 842.

Section 17.84(c) is distinguishable from both the GFSZA and the VAWA because the ultimate responsibility for the red wolf lies with the federal government. The regulation outlines the responsibilities and obligations of landowners with regard to any red wolves on their property. *See* 50 C.F.R. § 17.84(c). The FWS has also distributed fact sheets about the wolves and held meetings with local residents to explain the regulation and the reintroduction. From the time of reintroduction until 1994, North Carolina had no law or regulation concerning the red wolf. A recently passed North Carolina law bears a title starkly at odds with the federal regulation: "An Act to Allow the Trapping and Killing of Red Wolves by Owners of Private Land." 1994 N.C. Sess. Laws Ch. 635. Unlike the GFSZA and the VAWA, § 17.84(c) does not duplicate or supplement state and local regulation. Quite to the contrary, it simply provides federal support for an endangered species. The dangers of blurring are minimal where the federal role in the protection of endangered species has traditionally been so clear.

Congress, however, did not simply sweep away the role of the states by enacting a national solution to the problem of red wolf conservation. The ESA and § 17.84(c) embody principles of cooperative federalism and seek to involve the states in the conservation effort. Such cooperative federalism does not blur state and federal roles. First, a species is listed as endangered or threatened only after reviewing "those efforts, if any, being made by any State . . . to protect such species." 16 U.S.C. § 1533(b)(1)(A). Second, once the species has

recovered and is "delisted," management responsibility will return to the states. *See id.* § 1532(3) (defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary"). States can then regulate the species for hunting and resource management as it sees fit. For instance, in Minnesota, citizens have expressed interest in hunting the grey wolf, which is expected to be delisted soon and its management returned to the state. *See Feds Again Delay Wolf Management Plan: Officials Had to Do Some Rework After Legislature Failed to Pass State Plan*, Star-Tribune (Minneapolis), Nov. 29, 1999, at B7 (explaining that wolf numbers were strong enough to drop federal protection, but that the Minnesota legislature failed to pass a management plan for the wolves). Indeed, there is evidence that the recovery of the red wolf could allow a renewed trade in wolf pelts. For example, in the Northwestern Territories of Canada where wolves are plentiful, a hunter can command about $300 per pelt. *See* Fred Langan, *Hunters on Snowmobiles Cut Down Wolf Count in N.W.T.*, Calgary Herald, Mar. 3, 1998, at A7.

This regulation simply does not implicate any "immediate and concrete" federalism concerns by negating state contributions to species protection. *Brzonkala*, 169 F.3d at 840. Quite to the contrary, invalidating this regulation would deal a damaging blow to the essential place of the enumerated powers in preserving scarce resources of all sorts for the common good.

D.

Unlike the statutes in *Lopez* and *Brzonkala*, § 17.84(c) can be upheld while observing principled limitations on federal power. The regulation applies only to a single limited area—endangered species. It does not in any way grant Congress "an unlimited police power inconsistent with a Constitution of enumerated and limited federal powers." *Brzonkala*, 169 F.3d at 852. Nor does the regulation "obliterate the Constitution's distinction between national and local authority." *Morrison*, 2000 WL 574361, at *10. In *Lopez*, the Court rejected the "costs of crime" and "national productivity" justifications for the GFSZA, because under these theories it was "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." 514 U.S. at 564.

But these concerns are simply not implicated by § 17.84(c). Rather, the ESA and this regulation in particular permit the exercise of federal power only to conserve those species that are "endangered" or "threatened." The Secretary must determine whether a species is endangered or threatened "solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species." 16 U.S.C. § 1533(b)(1)(A). Only after determining that a species is endangered or threatened can Congress regulate it. The rationale for upholding § 17.84(c), and the ESA generally, is restricted to the special relationship between endangered species and interstate commerce as drawn in Part III. It is not a connection that can be drawn outside of the endangered species context to support federal regulation of just any local or intrastate object with a medical, scientific, or economic value.

The rationale for this regulation thus stops far short of conferring upon Congress a broad police power. It is instead appellants' arguments for invalidating this regulation that go too far. If the federal government cannot regulate the taking of an endangered or threatened species on private land, its conservation and preservation efforts would be limited to only federal lands. A ruling to this effect would place in peril the entire federal regulatory scheme for wildlife and natural resource conservation.

V.

Finally, we offer a brief response to the views of our dissenting brother. According to the dissent, *Lopez* and *Morrison* require us to hold that the regulation at issue exceeds Congress's commerce power. We cannot accept this view. To invalidate this regulation would require courts to move abruptly from preserving traditional state roles to dismantling historic federal ones.

The dissenting opinion regrettably offers no legal basis for taking such a leap. Instead, the dissent expresses a bevy of unsupported opinions. It offers its conclusory belief that the taking of a red wolf does not constitute an economic activity. *Post* at ___. It announces with some confidence that trade in wolf pelts will never revive. *Post* at ___. And it dismisses the available studies on the red wolf's ecological and commercial value without offering the slightest bit of evidence to contradict them. *Post* at ___. Where exactly the dissent derives its view of the inconsequential status of this species is a mystery to us. But it cannot be that the mere expression of judicial derision for the efforts of the democratic branches is enough to discard them.

There should be no doubt about the implications of the dissenting opinion. Our dissenting colleague would rework the relationship between the judiciary and its coordinate branches. It is apparent that the dissent regards § 17.84(c) as ill-advised. That is fair enough, but a judge's view of the wisdom of enacted policies affords no warrant for declaring them unconstitutional. *See TVA v. Hill*, 437 U.S. at 195 ("In our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches."). In recognition of the fact that the wisdom of legislation is different from its constitutionality, courts have always started with a presumption in favor of an enactment's constitutionality. *Lopez* and *Morrison* have not shifted this presumption. In fact, they have carefully maintained it. *See Morrison*, 2000 WL 574361, at *6 ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."); *Lopez*, 514 U.S. at 568. Our dissenting brother proceeds on the quite contrary premise that the burden now rests with those who wish to uphold legislation. We know of no other way to interpret the dissent's view that the empirical underpinnings of this regulation are inadequate.

Reversing the presumption in favor of constitutionality plunges our dissenting brother into the thick of political controversy. As the arguments and briefs in this case attest, the matter in question involves a rather traditional struggle between property owners on the one hand

and environmentalists on the other. Both sides in this political standoff have their legitimate points to make. Property owners understandably seek more freedom to take wolves on their property. Those opposing them seek to impress the fact that even private property has historically been imbued with public responsibilities. Why the judicial branch should place its thumb on either side of this old political scale is simply beyond our comprehension. Both concern for property rights and concern for the environment play important roles in shaping political decisions. But neither can automatically be allowed to grind the nation's commerce power to a constitutional halt. An indiscriminate willingness to constitutionalize recurrent political controversies will weaken democratic authority and spell no end of trouble for the courts.

This danger is made more acute by the failure of the dissent to adopt any limiting principle for its approach. The dissent dismisses the regulation at issue as implicating nothing more than "a handful of animals, if even that, in one small region of one state." *Post* at ___. It declares that because there are only 41 wolves on private land, "the killing of even all 41 of the estimated red wolves" cannot have a substantial effect on interstate commerce. *Post* at ___. Far from being a limiting approach, the dissent's formulation is one of unprecedented breadth. It holds in essence that an endangered species can have no effect on interstate commerce on account of its endangered status and that scarce resources are on account of their scarcity too trivial to justify protection. The dissent further ignores the fact that the scarcest of natural resources, be they wildlife or mineral, will often be found in one limited locality. For

the federal courts to constitutionally disable the federal government from acting in the face of scarcity is to deal a severe blow to national strength.

Sapping the national ability to safeguard natural resources is not a course supported by precedent. After *Lopez*, the Supreme Court upheld a broad interpretation of the Endangered Species Act, see *Sweet Home*, 515 U.S. 687. And in *Morrison* the Supreme Court cited *Wickard v. Filburn* and *Heart of Atlanta Motel* for the proposition that the authority of the national government to regulate intrastate economic activity in proper circumstances had not been dismembered. 2000 WL 574361, at *7. Yet in the truncated legal universe of the dissent, the national interest in the development of natural resources counts for naught, and these cases and propositions have little, if any, role to play.

Finally, the dissenting opinion works a rent in the fabric of Our Federalism. Striking down this regulation will turn federalism on its head. *Lopez* and *Morrison* rightly emphasized the fact that the federal involvement with local school zones and the creation of civil causes of action to prevent gender-motivated violence encroached on what are traditional state functions. By contrast, the preservation of endangered species is historically a federal function. *Lopez* and *Morrison* recognized the importance of judicial review under the Commerce Clause. But, unlike the dissent, those cases set boundaries to that review and did not transform the reviewing function from a shield protecting state activities into a sword dismembering a long recognized federal one. It is as threatening to federalism for courts to erode the historic national role over scarce resource conservation as it is for Congress to usurp traditional state pre-

rogatives in such areas as education and domestic relations. Courts seeking to enforce the structural constraints of federalism must respect the balance on both sides.[5]

Of course natural resource conservation is economic and commercial. If we were to decide that this regulation lacked a substantial effect on commerce and therefore was invalid, we would open the door to standardless judicial rejection of democratic initiatives of all sorts. Courts need not side with one party or the other on the wisdom of this endangered species regulation. We hold only as a basic maxim of judicial restraint that Congress may constitutionally address the problem of protecting endangered species in the manner undertaken herein. The political, not the judicial, process is the appropriate arena for the resolution of this particular dispute. The judgment of the district court is accordingly

AFFIRMED.

LUTTIG, Circuit Judge, dissenting:

I wrote extensively on the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), and on

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[5] Emphasizing the political nature of this particular dispute does not consign Commerce Clause adjudications to the political processes, but rather takes account of the fact that judicial review is limited by the due respect that we must have for the decisions of a coordinate branch. *See Morrison*, 2000 WL 574361, at *6. It is therefore both amusing and incorrect for the dissent to suggest that upholding this endangered species regulation would somehow render Lopez or Morrison an "aberration," *post* at ___. The dissent ignores the significant differences between those cases and the present one—differences that we have chronicled in detail and with which the dissent has made no effort to deal.

the Commerce Clause in the wake of that decision, in *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820 (4th Cir. 1999). And the Supreme Court has now provided even further guidance for the lower courts through its decision in *Brzonkala*, which is ultimately styled in that court as *United States v. Morrison*, 2000 WL 574361 (May 15, 2000). If one holds the views expressed by the Supreme Court majority in *Lopez* and *Morrison*, and by our court in *Brzonkala*, a belabored discussion of the implications of those decisions for the regulation at issue before us today is not necessary.

Here, the Fish and Wildlife Service has promulgated a regulation that prohibits private landowners from shooting, wounding, killing, trapping, or otherwise harming the canis rufus, or the red wolf, even when the wolves are on the private landowners' property and threatening their crops and livestock. However, in what the majority characterizes as an act of beneficence by the government to benefit the landowners, the government does allow a property owner—even on his own property—to kill a wolf if the wolf is about to kill the property owner himself or his family. *Ante* at ___. The question presented to us for decision is not "whether the national government can act to conserve scarce natural resources of value to our entire country," *ante* at ___, whether we should "hold as a basic maxim of judicial restraint that Congress may constitutionally address the problem of protecting endangered species," ___, or whether our decision today will "work[ ] a rent in the fabric of Our Federalism," ___, "turn federalism on its head," *id.*, or "open the door to standardless judicial rejection of democratic initiatives of all sorts," ___. Rather, the simple (and frankly, considerably less inci-

tant) question of law for us to decide is whether, assuming its validity under statute, this one particular Fish and Wildlife regulation exceeds Congress' power under the Commerce Clause.

As the majority recites, there are an estimated 41 red wolves resident on private property and 75 red wolves total, in eastern North Carolina. The majority sustains the Fish and Wildlife's regulation unhesitatingly on the ground that the taking of the 41 red wolves that might occur as property owners attempt to protect themselves and their families, their property, their crops, and their livestock from these wolves, will have a "substantial effect" on interstate commerce. This substantial effect on interstate commerce comprises, according to the majority, four separate effects on such commerce, each of which the majority views as "substantial."

First, the majority concludes, in exclusive reliance upon a Cornell University professor's unpublished study entitled "Red Wolf Recovery in Northeastern North Carolina and the Great Smoky Mountains National Park," that "many tourists travel to North Carolina from throughout the country for 'howling events'—evenings of listening to wolf howls accompanied by educational programs," ___, and thus that the taking of these wolves will have a substantial effect on the interstate commercial industry of tourism.

Second, the majority concludes, largely in reliance, not upon their substantive conclusions, but rather upon the fact of the generation of two articles—"The Red Wolf as a Model for Carnivore Reintroductions," which was published in the Symposium of the Zoological Society of London, and the 1994 unpublished study "Alligator River National Wildlife Refuge Red Wolf (Canis

Rufus) Scat Analysis"—that the taking of these red wolves will have a substantial effect on the "interstate market" of "scientific research." ___.

Third, the majority concludes, largely on the strength of an article that appears in the University of Pennsylvania Journal of International Economic Law, that the taking of these wolves will have a substantial effect on the majority-anticipated resurrection of an interstate trade in fur pelts. *Ante* at ___. In reliance upon an article that appeared two years ago in the Calgary Herald entitled "Hunters on Snowmobiles Cut Down Wolf Count in N.W.T.," the majority observes that "for example, in the Northwestern Territories of Canada where wolves are plentiful, a hunter can command about $ 300 per pelt." *Ante* at ___. The majority frankly acknowledges that there has not been a trade in wolf pelts since the 1800s, *ante* at ___, but, to the majority, "this temporal difference is beside the point." *Id.*

Finally, in reliance upon yet another unpublished study by Robert Esher and Theodore Simons entitled "Red Wolf Propagation on Horn Island, Mississippi: Red Wolf Ecological Studies," and by analogy to the finding therein of "increased shore bird nesting, likely due to the reduction in raccoon predation," *ante* at ___, the majority concludes that the red wolves which the farmers and landowners have heretofore thought threatened their families, their crops, and their livestock, actually help the farmers, by killing the animals that destroy the farmers' crops, and thereby substantially affect interstate commerce. *Ante* at ___.

That these conclusions are not even arguably sustainable under *Lopez*, *Morrison*, and *Brzonkala*, much less for the reasons cobbled together by the majority, is

evident from the mere recitation of the conclusions. The killing of even all 41 of the estimated red wolves that live on private property in North Carolina would not constitute an economic activity of the kind held by the Court in *Lopez* and in *Morrison* to be of central concern to the Commerce Clause, if it could be said to constitute an economic activity at all. *Morrison*, 2000 WL 574361, at *8 ("[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case."). It is for this reason that the majority's attempted aggregation is impermissible: "While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." 2000 WL 574361, at *9 (citations omitted). But even assuming that such is an economic activity, it certainly is not an activity that has a substantial effect on interstate commerce. The number of inferences (not even to mention the amount of speculation) necessary to discern in this activity a substantial effect on interstate commerce is exponentially greater than the number necessary in *Lopez* to show a substantial effect on interstate commerce from the sale of guns near schools or in *Morrison* to show a substantial effect on interstate commerce from domestic assault. The number (and the speculation) is even greater than that necessary in *Wickard v. Filburn*, 317 U.S. 111 (1942). And, it bears reminding, the regulated activity in *Lopez* and *Wickard* at least was in some sense economic in character.

In a word, the expansive view of the Commerce power expressed by the majority today is closely akin to that separately expressed by Justice Breyer in his dissent in *Lopez* and Justice Souter in his dissent in *Morrison*, and certainly more closely akin to those dissenting Justices' views than it is to the view of the *Lopez* majority in *Lopez* and *Morrison*. Indeed, all in all, it is a view far more expansive than that expressed by any of the dissenting Justices in either *Lopez* or *Morrison*—a fact confirmed by the dissents in *Morrison*, ironically the case for which the majority herein unnecessarily held this case in abeyance. *See* Order of April 21, 2000 (Luttig, J., dissenting from abeyance order). It goes without saying that it is much more like that of the dissent in *Brzonkala* than that of the majority in our court. *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820, 905 (Motz, J., dissenting).

Indeed, if the Supreme Court were to render tomorrow the identical opinion that the majority does today (not necessarily the decision, but the opinion, worded capaciously as it is), both *Lopez* and *Morrison* would be consigned to aberration. And, by deciding this case as it does, and on the particular reasoning that it does, the majority would have all but consigned to aberration our own decision in *Brzonkala* were it not for the Supreme Court's recent affirmance of that decision.

I would invalidate this particular agency regulation under *Lopez*, *Morrison*, and *Brzonkala*, and instead recognize as the aberration that action of invalidation, rather than the opinions in *Lopez*, *Morrison*, and *Brzonkala*, as does the majority. *Compare Morrison*, 2000 WL 574361, at *30 (Souter, J., dissenting) (similarly to majority, characterizing *Lopez* and *Morrison*, and by

implication *Brzonkala*, as aberrational vis-a-vis the sixty years of jurisprudence predating *Lopez* and predicting that *Lopez* and *Morrison* will not be "enduring law"); *see also Morrison*, 2000 WL 574361, at *35 (Breyer, J., dissenting) ("And even were I to accept *Lopez* as an accurate statement of the law, which I do not . . . ."). I would do so without any fear whatsoever that such "would place in peril the entire federal regulatory scheme for wildlife and natural resource conservation," *ante* at ___, as the majority over-rhetorically predicts would result from the invalidation of this lone regulation. No more so than in *Brzonkala* will "maintaining the integrity of the enumerated powers" by invalidating this single regulation "mean that statutes will topple like falling dominos." *Brzonkala*, 169 F.3d at 897 (Wilkinson, J., concurring).

While it could be lost in a reading of the majority opinion, we do not address here Congress' power over either the channels or instrumentalities of interstate commerce. We do not address activity that is interstate in character. We do not address in this case a statute or a regulation with an express interstate commerce jurisdictional requirement, which would all but ensure constitutional validity. We do not have before us an activity that has obvious economic character and impact, such as is typically the case with non-wildlife natural resources, and even with other wildlife resources. We are not even presented with an activity as to which a plausible case of future economic character and impact can be made.

To the contrary, we are confronted here with an administrative agency regulation of an activity that implicates but a handful of animals, if even that, in one small region of one state. An activity that not only has no cur-

rent economic character, but one that concededly has had no economic character for well over a century now. An activity that has no foreseeable economic character at all, except upon the baldest (though admittedly most humorous) of speculation that the red wolf pelt trade will once again emerge as a centerpiece of our Nation's economy. And, importantly, an activity that Congress could plainly regulate under its spending power and under its power over federal lands, regardless.

Judge Wilkinson, for his part, has written that he regards *Lopez*, *Brzonkala*, and presumably now *Morrison*, as examples in a "spate of decisions" of "contemporary judicial activism," *Brzonkala*, 169 F.3d 820, 892-93 (Wilkinson, J., concurring), as he similarly regards the Supreme Court's decisions in *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); and *New York v. United States*, 505 U.S. 144 (1992). *See id.* The dissenting Justices in both *Lopez* and *Morrison* similarly regard these decisions. *See, e.g.*, *Morrison*, 2000 WL 574361, at *17 (Souter, J., dissenting); *see also Morrison*, 2000 WL 574361, at *30 (Breyer, J., dissenting). But I do not regard these decisions as such, and I certainly do not understand the majority of the Supreme Court to so regard these decisions.

Nor, in the wake of *Lopez* and *Morrison*, can I accept my colleagues' view of the appropriate role of the judiciary in Commerce Clause disputes. As Judge Wilkinson's view of *Lopez* mirrors that of the dissenters in *Lopez* and *Morrison*, so also does my colleagues' view of the judiciary's role in Commerce Clause conflicts mirror that of the *Lopez* and *Morrison* dissenters. The majority herein, like the dissents in both *Lopez* and *Morrison*,

takes the view that the political processes are the safeguard against federal encroachment upon the states. Thus, the majority concludes its opinion: "The political, not the judicial, process is the appropriate arena for the resolution of this particular dispute." *See ante* at ___. *Accord Morrison*, 2000 WL 574361 at *26 (Souter, J., dissenting) ("The defect, in essence, is the majority's rejection of the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests . . . ."); *id.* at *27 ("As with 'conflicts of economic interest,' so with supposed conflicts of sovereign political interests implicated by the Commerce Clause: the Constitution remits them to politics."); *id.* (Breyer, J., dissenting) (citing Souter, J., dissenting, in *Morrison*; Stevens, J., dissenting, in *Kimel v. Florida Bd. of Regents*, 528 U.S. ___ (2000); and Blackmun, J., for the court, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)).

The majority of the Supreme Court in *Lopez* and *Morrison* has left no doubt, however, that the interpretation of this clause of the Constitution, no less so than any other, must ultimately rest not with the political branches, but with the judiciary. *See Lopez*, 514 U.S. 549, 557 n.2 ("Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.") (quoting *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring)); *Morrison*, 2000 WL 574361, at *10 n.7 ("Departing from their parliamentary past, the Framers adopted a written Constitution that further divided authority at the federal level so that the

Constitution's provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the legislature's self-restraint. *See, e.g., Marbury v. Madison*, 1 Cranch 137, 176 (1803) (Marshall, C.J.).").

Accordingly, I would faithfully apply in this case the Supreme Court's landmark decisions in *Lopez* and *Morrison*, as I would in any other case. The affirmative reach and the negative limits of the Commerce Clause do not wax and wane depending upon the subject matter of the particular legislation under challenge.

No. 99-1218

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHARLES GILBERT GIBBS; RICHARD LEE MANN, III; HYDE COUNTY, NORTH CAROLINA; WASHINGTON COUNTY, NORTH CAROLINA,

Plaintiffs-Appellants,

v.

BRUCE BABBITT, Secretary of the Interior, in his official capacity; UNITED STATES FISH AND WILDLIFE SERVICE; UNITED STATES DEPARTMENT OF THE INTERIOR; JAMIE CLARK, Director of the U.S. Fish and Wildlife Service,

Defendants-Appellees,

DEFENDERS OF WILDLIFE,

Intervenor-Appellee.

PACIFIC LEGAL FOUNDATION; NATIONAL WILDERNESS INSTITUTE; WASHINGTON LEGAL FOUNDATION; THE ALLIED EDUCATION FOUNDATION; NATIONAL WILDLIFE FEDERATION; NORTH CAROLINA WILDLIFE FEDERATION; ENVIRONMENTAL DEFENSE FUND; WORLD WILDLIFE FUND; CENTER FOR MARINE CONSERVATION,

Amici Curiae.

Filed August 25, 2000

ON PETITION FOR REHEARING EN BANC

Appellants' petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

No. 4-97-CV-41-BO

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, EASTERN DIVISION

CHARLES GILBERT GIBBS, SR.; RICHARD LEE MANN; HYDE COUNTY, NORTH CAROLINA; and WASHINGTON COUNTY, NORTH CAROLINA,

Plaintiffs,

v.

BRUCE BABBITT, U.S. SECRETARY OF THE INTERIOR, in his official capacity; U.S. DEPARTMENT OF THE INTERIOR; JAMIE CLARK, DIRECTOR U.S. FISH AND WILDLIFE SERVICE, in her official capacity; and U.S. FISH AND WILDLIFE SERVICE,

Federal Defendants, and

DEFENDERS OF WILDLIFE,

Defendant-Intervenor.

Decided December 21, 1998

ORDER

This matter is before the Court on three motions for summary judgment: one each from the Plaintiffs, Federal Defendants, and Defendant-Intervenors. The underlying action, in its present form, is for relief from alleged violations of the Constitution, and especially the Tenth Amendment, by the United States Fish and Wildlife Service ("FWS"). Plaintiffs seek various forms of relief, including a declaration that all federal regulations

relating to the taking of red wolves on private land are invalid, a declaration of the primacy of North Carolina laws regarding the red wolves over conflicting federal regulation, an injunction against FWS enforcement of federal regulations relating to the taking of red wolves on private land in Hyde and Washington Counties, and an award of attorney's fees and costs.

PROCEDURAL BACKGROUND

Plaintiffs filed suit against Defendants on March 3, 1997, initially presenting four claims for relief. On June 29, 1998, this Court received a stipulation of dismissal of the Plaintiffs' first, second, and third claims, leaving only one claim for relief, centering around alleged violation of the Tenth Amendment. On October 27, 1997, this Court granted a motion to intervene by the group Defenders of Wildlife, who were accordingly added as to the case as Defendant-Intervenors. A hearing was held in this matter on October 21, 1998. Discovery is complete in this matter, and the three motions for summary judgment before this Court are ripe for decision.

STATEMENT OF FACTS

The saga of the red wolf[1] in eastern North Carolina began in 1986, when the United States Fish and Wildlife

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1 The red wolf (*Canis Rufus*) was designated an endangered species in 1967. There is some question in the scientific community as to whether the red wolf is a "species," for purposes of the ESA, or a "hybrid," a result of crossbreeding between the gray wolf and the coyote. In the 1970s the FWS trapped the last red wolves in the wild and established a number of captive breeding programs. The success of these captive breeding programs allowed the FWS to consider reintroducing the red wolf to the

[Footnote continued on next page]

Service announced that it was proposing to introduce an "experimental"[2] population of red wolves into the Alligator River National Wildlife Refuge. After a period of public comment, the FWS issued a final rule outlining its release plan for red wolves on November 19, 1986.

In the fall of 1987, the FWS released four pairs of captive red wolves into the Alligator River National Wildlife Refuge. Significant resources have been devoted to this program, and the population of red wolves in the wild has grown. As the red wolves have begun to establish themselves, they have, of course, wandered off of federal land and on to surrounding private land.

This movement of red wolves onto private land provides the basis of this case. Under the Endangered Species Act ("ESA"), as well as the current rule relating to red wolves, the FWS regulates the extent to which citizens can take[3] a red wolf that has strayed off govern-

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wild. A previous proposal to release red wolves in Kentucky and Tennessee was withdrawn due to public opposition.

[2] The "experimental" designation allows the government to introduce experimental populations of endangered or threatened species into areas unoccupied by that species. Such a release is, of course, a risk to the individual animals involved, and the government can only conduct such experiments with populations considered "nonessential" to "the continued existence of an endangered species or threatened species." *See* 16 U.S.C. § 1539(j).

[3] In the context of this order, "taking" is used not as a constitutional term of art, but as it is defined in the Endangered Species Act: "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect [an endangered
[Footnote continued on next page]

ment land. *See* 50 C.F.R. § 17.84(c).[4] This regulation is promulgated pursuant to § 9(a)(1) of the ESA. *See* 16

[Footnote continued from previous page]
species], or to attempt to engage in any such conduct." 16 U.S.C. § 1532 (19).

[4] The relevant text of the regulation is as follows:

(4)(i) Any person may take red wolves found on private land in the areas defined in paragraphs (c)(9)(i) and (ii) of this section, provided that such taking is not intentional or willful, or is in defense of that person's own life or the lives of others; and that such taking is reported within 24 hours to the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer for investigation. . . .

(iii) Any private landowner, or any other individual having his or her permission, may take red wolves found on his or her property in the areas defined in paragraphs (c)(9)(i) and (ii) of this section when the wolves are in the act of killing livestock or pets, provided that freshly wounded or killed livestock or pets are evident and that all such taking shall be reported within 24 hours to the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer for investigation.

(iv) Any private landowner, or any other individual having his or her permission, may harass red wolves found on his or her property in the areas defined in paragraphs (c)(9)(i) and (ii) of this section, provided that all such harassment is by methods that are not lethal or physically injurious to the red wolf and is reported within 24 hours to the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife en-

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U.S.C. § 1538(a). Under this regulation, Plaintiff Richard Lee Mann was prosecuted, and after he pled guilty, fined and sentenced to perform community service building "wolfhouses" and feeding red wolves. Opposition to the red wolf project grew, and in 1992, the County Commission of Washington County, North Carolina passed a resolution opposing the red wolf program. This was followed in 1994 by a Hyde County, North Carolina, resolution requesting removal of red wolves from the County's private lands. This led to a 1994 North Carolina Department of Agriculture protest of the red wolf program.

Finally, in 1994, frustrated opponents of the red wolf program introduced "An Act to Allow the Trapping and Killing of Red Wolves by Owners of Private Land." *See* 1994 N.C. Sess. Laws Ch. 635. This bill, as passed into law, declared it "lawful for a private landowner or the landowner's agent at any time to trap and kill red wolves

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forcement officer, as noted in paragraph (c)(6) of this section for investigation.

(v) Any private landowner may take red wolves found on his or her property in the areas defined in paragraphs (c)(9)(i) and (ii) of this section after efforts by project personnel to capture such animals have been abandoned, provided that the Service project leader or biologist has approved such actions in writing and all such taking shall be reported within 24 hours to the Service project leader or biologist, the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer for investigation.

Excerpts are taken from 50 C.F.R. § 17.84(c).

that are on the landowner's property, and that the property owner reasonably believes may be a threat to the person's own life or the lives of others, or to the life of livestock on the property," provided that the "landowner has previously requested the [FWS] to remove the red wolves from the landowner's property and that the landowner shall report the killing of a wolf to the [FWS] within 48 hours." *See* 1994 N.C. Sess. Laws Ch. 635 (July 1, 1994) (law applicable only in Hyde and Washington Counties). In 1995, this law was amended to include Beaufort and Crāven Counties. *See* 1995 N.C. Sess. Laws Ch. 83 (May 15, 1995). The FWS regulations regarding the red wolf are thus in direct conflict with the laws of the State of North Carolina.[5]

As of February 1998, approximately 75 red wolves were living in the wild in eastern North Carolina.[6]

DISCUSSION

Because of the Plaintiffs' stipulation voluntarily dismissing three of their four claims for relief, this Court need only consider those issues elucidated in Plaintiffs' Fourth Claim for Relief. This claim alleges that the fed-

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[5] After passage of the conflicting North Carolina law, the FWS revised its red wolf regulation to modify the circumstances under which red wolves could be taken by the public. This revised regulation still includes taking regulations in conflict with the North Carolina law. *See* 60 Fed. Reg. 18940, 18941 (1995). These changes are reflected in the excerpts from 50 C.F.R. § 17.84(c) found in footnote 4, *supra*.

[6] A similar program in the Great Smoky Mountains was recently abandoned due to the lack of success of the red wolves in adapting to that area.

eral government has violated the Tenth Amendment to the United States Constitution by "exceeding its constitutional power and privilege by prohibiting the take (sic) of red wolves on private land in Hyde County and Washington County." Plaintiffs request that this Court invalidate all federal regulations relating to the taking of red wolves on private land in Hyde and Washington Counties, "declare the primacy of North Carolina state law [relating to the taking of red wolves] against all conflicting federal regulation," and enjoin the Fish and Wildlife Service from enforcing regulations relating to the taking of red wolves on private land in Hyde and Washington Counties.

Due to the Plaintiffs' decision to concede all but their fourth claim for relief, the issue before this Court can be clearly stated by a single question: Does the federal government have the power under the Constitution of the United States to promulgate 50 C.F.R. § 17.84?

Plaintiffs, by dismissing with prejudice their other claims, have chosen to concede any issues relating to the propriety of the rulemaking process. Thus, this Court can analyze 50 C.F.R. § 17.84 in the same way it would had that regulation been passed by both Houses of Congress and signed by the President, as opposed to promulgated through the exercise of delegated rulemaking authority.

Thus, this Court begins its analysis by searching in the Constitution for a grant of authority, to Congress to make a law regulating the taking of red wolves on private land. Upon examination, the most likely source for such authority is the Commerce Clause, which states that "The Congress shall have Power . . . To regulate

Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Supreme Court precedent tells us that the Commerce Clause is much broader than it might appear, and that it is important to remember that "the task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981). Even after *Lopez* placed limits on the Commerce Clause as a grant of Congressional authority, a reviewing court need only determine "whether a rational basis existed for concluding that a regulated activity" substantially affects interstate commerce. *United States v. Lopez*, 514 U.S. 549, 557 (1995).[7]

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[7] Every circuit to consider such a matter has applied the rational basis test to post-*Lopez* Commerce Clause challenges. *See Hoffman v. Hunt*, 126 F.3d 575, 583-88 (stating and applying rational basis test) (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1838 (1997); *United States v. Knutson*, 113 F.3d 27, 29 (5th Cir. 1997) (same); *United States v. Parker*, 108 F.3d 28, 30 (3rd Cir. 1997), *cert. denied*, 118 S. Ct. 111 (1997) (same); *United States v. Olin Corp.*, 107 F.3d 1506, 1509 (11th Cir. 1997) (same); *United States v. Bramble*, 103 F.3d 1475, 1482 (9th Cir. 1996) (same); *Terry v. Reno*, 101 F.3d 1412, 1416 (D.C.Cir.1996), *cert. denied*, 520 U.S. 1264 (1997) (same); *Proyect v. United States*, 101 F.3d 11, 12 (2d Cir. 1996) (same); *United States v. McHenry*, 97 F.3d 125, 128 (6th Cir. 1996), *cert. denied*, 519 U.S. 1131 (1997) (same); *United States v. Hampshire*, 95 F.3d 999, 1001 (10th Cir. 1996), *cert. denied*, 519 U.S. 1084 (1997) (same); *United States v. Kenney*, 91 F.3d 884, 889 (7th Cir. 1996) (same); *United States v. Dinwiddie*, 76 F.3d 913, 920 (8th Cir. 1996), *cert. denied*, 519 U.S. 1043 (1996) (same).

Lopez set forth the three broad categories of activity that Congress may regulate consistent with the Commerce Clause:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce. 514 U.S. at 558-59.

In this case, the nexus between the regulation at issue and interstate commerce is the red wolf. The record in this case clearly demonstrates that red wolves are "things in interstate commerce," and that they substantially affect interstate commerce through their tourism value. Under *Lopez*, it is irrelevant that the threat to red wolf-related commerce comes from intrastate "taking" of red wolves.[8]

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[8] *Lopez* also instructs a Court engaged in Commerce Clause analysis to "consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce." 514 U.S. at 562. According to Congress, the various species protected by the ESA "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation." 16 U.S.C. § 1531(a)(3). This value, in the case of the red wolf, leads to a significant impact on interstate commerce.

Defendants in this case have demonstrated that tourists do cross state lines to see the red wolf, and that these tourists have an impact on commerce.[9] Defendants have further demonstrated that red wolves are to be found in several States,[10] and that some of the red wolves of Eastern North Carolina either have crossed state lines or may cross state lines in the future. All of these actions have economic consequences, as tourists, academics, and scientists follow the red wolves.[11] Unrestricted taking of red wolves on private land would present a clear threat to this commerce.[12]

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9 While it is difficult for this Court to fully assess the red wolf's impact on tourism, Defendants have presented proof that many persons have traveled from other states to attend red wolf "howling" events conducted at the Alligator River National Wildlife Refuge in North Carolina.

10 Even after the elimination of the experimental population of red wolves in the Great Smoky Mountains National Park, red wolves may be found in North Carolina, South Carolina, Florida, and Mississippi.

11 Plaintiffs do not dispute that tourists, scientists, and other interested individuals are presently traveling across state lines to view and study red wolves in the wild.

12 In another case challenging the Constitutional validity of a regulation promulgated to § 9(a)(1) of the ESA, the D.C. Circuit upheld a regulation protecting the Delhi Sands Flower-loving Fly from "takings" as a valid exercise of Congress's authority to regulate interstate commerce under the Commerce Clause. *See National Association of Home Builders v. Babbitt*, 327 U.S. App. D.C. 248, 130 F.3d 1041, 1057 (D.C.Cir. 1997). Judge Henderson, in her concurrence, based this finding on the theory that § 9(a)(1) of the ESA protects "biodiversity" and that the continued existence of said "biodiversity" substantially affects

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CONCLUSION

In assessing whether Congress exceeded its authority under the Commerce Clause, this Court notes that every act of Congress is entitled to a "strong presumption of validity and constitutionality." *Barwick v. Celotex Corp.*, 736 F.2d 946, 955 (4th Cir. 1984). Since *Lopez*, no Circuit Court has determined that a federal statute is unconstitutional because it overreaches the Commerce Clause.[13] This Court does not find that this case com-

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interstate commerce, thus meeting the third *Lopez* test. This Court need not reach the issue of whether protection of "biodiversity" itself justifies Congressional action under the Commerce Clause, as the red wolf has a much more significant impact on interstate commerce and is more clearly a "thing[] in interstate commerce" than the Delhi Sands Flower-loving Fly.

[13] Thus, it is unsurprising that "courts have resisted urgings to extend Lopez beyond § 922(q)." *United States v. Wall*, 92 F.3d 1444, 1448 (6th Cir. 1996), *cert. denied*, 519 U.S. 1059 (1997) (upholding 18 U.S.C. § 1955, which prohibits *inter alia* intrastate illegal gambling activities). Indeed, post-*Lopez*, innumerable federal statutes have been challenged on Commerce Clause grounds but not a single one has been invalidated by a federal appellate court. *See, e.g.*, *Hoffman*, 126 F.3d 575, 582-88 (upholding 18 U.S.C. § 248, which prohibits interference with access to reproductive health clinics); *United States v. Soderna*, 82 F.3d 1370, 1373-74 (7th Cir.), *cert. denied*, 117 S. Ct. 507 (1996) (same); *Dinwiddie*, 76 F.3d at 919-21 (same); *Terry*, 101 F.3d at 1415-18 (same); *United States v. Wright*, 117 F.3d 1265, 1268-1271 (upholding 18 U.S.C. § 922(o), which prohibits intrastate possession of machine gun, and noting that every circuit to consider the question had so held) (11th Cir. 1997), *vacated in part on rehearing on other grounds*, 133 F.3d 1412 (1998); *United States v. Crump*, 120 F.3d 462, 465-66 (4th Cir. 1997) (upholding 18 U.S.C. § 924(c)(1), which prohibits use and carrying of a firearm
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pels a crossing of that line. There is a clear nexus between protection of endangered red wolves from taking and interstate commerce. Thus, this Court finds that the regulation at issue in this case is a legitimate exercise of federal power under the Commerce Clause. Accordingly, Defendants' Motions for Summary Judgment are GRANTED, and Plaintiffs' Motion for Summary Judgment is DENIED.

SO ORDERED. This 21 day of December, 1998.

TERRENCE W. BOYLE

CHIEF UNITED STATES DISTRICT JUDGE

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during and in relation to a drug trafficking crime, and noting "all of the circuits that have considered the question" had upheld the statute in the face of a *Lopez* challenge); *Olin Corp.*, 107 F.3d at 1509-10 (upholding CERCLA, 42 U.S.C. § § 9601-9675); *United States v. Allen*, 106 F.3d 695, 700-1 (6th Cir. 1997), *cert. denied*, 520 U.S. 1281 (1997) (upholding 21 U.S.C. § 860(a), the Drug Free School-Zones Act); *United States v. Hawkins*, 104 F.3d 437, 439-40 (D.C.Cir. 1997), *cert. denied*, 118 S. Ct. 126 (1997) (same); *United States v. Wells*, 98 F.3d 808, 810-11 (4th Cir.1996) (upholding 18 U.S.C. § 922(g), which prohibits possession of a firearm by a felon, and noting ten other circuits that had upheld its constitutionality under *Lopez*); *United States v. Genao*, 79 F.3d 1333, 1335-37 (2d Cir. 1996) (same); *United States v. Tisor*, 96 F.3d 370, 373-75 (9th Cir.1996), *cert. denied*, 519 U.S. 1140 (1997) (upholding congressional authority to prohibit intrastate possession or sale of narcotics); *Bramble*, 103 F.3d at 1479-82 (upholding the Eagle Protection Act, 16 U.S.C. § 668); *United States v. Michael R.*, 90 F.3d 340, 343-45 (9th Cir. 1996) (upholding 18 U.S.C. § 922(x)(2), which prohibits juvenile possession of a handgun); *United States v. Lomayaoma*, 86 F.3d 142, 144-46 (9th Cir.), *cert. denied*, 519 U.S. 909 (1996) (upholding the Indian Major Crimes Act, 18 U.S.C. § 1153).

[50 C.F.R.] § 17.84 Special rules—vertebrates.

* * *

(c) Red wolf (Canis rufus).

(1) The red wolf populations identified in paragraphs (c)(9)(i) and (c)(9)(ii) of this section are nonessential experimental populations.

(2) No person may take this species, except as provided in paragraphs (c)(3) through (5) and (10) of this section.

(3) Any person with a valid permit issued by the Service under § 17.32 may take red wolves for educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Act and in accordance with applicable State fish and wildlife conservation laws and regulations;

(4)(i) Any person may take red wolves found in the area defined in paragraph (c)(9)(i) of this section in defense of that person's own life or the lives of others, Provided That such taking shall be immediately reported to the refuge manager, as noted in paragraph (c)(6) of this section.

(ii) Any person may take red wolves found in the area defined in paragraph (c)(9)(ii) of this section, Provided That such taking is incidental to lawful recreational activities or in defense of that person's own life or the lives of others, and that such taking is reported immediately to the Park Superintendent.

(iii) Any livestock owner may harass red wolves found in the area defined in paragraph (c)(9)(ii) of this

section actually pursuing or killing livestock on private properties, Provided That all such harassment is by methods that are not lethal or physically injurious to the red wolf and is reported immediately to the Park Superintendent.

(iv) Any livestock owner may take red wolves found in the area defined in paragraph (c)(9)(ii) of this section to protect livestock actually pursued or being killed on private properties after efforts to capture depredating red wolves by project personnel have proven unsuccessful, Provided That all such taking shall be immediately reported to the Park Superintendent.

(5) Any employee or agent of the Service or State conservation agency who is designated for such purposes, when acting in the course of official duties, may take a red wolf if such action is necessary to:

(i) Aid a sick, injured, or orphaned specimen;

(ii) Dispose of a dead specimen, or salvage a dead specimen which may be useful for scientific study;

(iii) Take an animal that constitutes a demonstrable but non-immediate threat to human safety or that is responsible for depredations to lawfully present domestic animals or other personal property, if it has not been possible to otherwise eliminate such depredation or loss of personal property, Provided That such taking must be done in a humane manner, and may involve killing or injuring the animal only if it has not been possible to eliminate such threat by live capturing and releasing the specimen unharmed on the refuge or Park;

(iv) Move an animal for genetic purposes.

(6) Any taking pursuant to paragraphs (c)(3) through (5) of this section must be immediately reported to either the Refuge Manager, Alligator River National Wildlife Refuge, Manteo, North Carolina, telephone 919/473-1131, or the Superintendent, Great Smoky Mountains National Park, Gatlinburg, Tennessee, telephone 615/436-1294. Either of these persons will determine disposition of any live or dead specimens.

(7) No person shall possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever, any such species taken in violation of these regulations or in violation of applicable State fish and wildlife laws or regulations or the Endangered Species Act.

(8) It is unlawful for any person to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in paragraphs (c) (2) through (7) of this section.

(9)(i) The Alligator River National Wildlife Refuge reintroduction site is within the historic range of the species in North Carolina, in Dare and Tyrrell Counties; because of their proximity, Beaufort, Hyde, and Washington Counties are also included in the experimental population designation.

(ii) The red wolf also historically occurred on lands that now comprise the Great Smoky Mountains National Park. The Park encompasses properties within Haywood and Swain Counties in North Carolina, and Blount, Cocke, and Sevier Counties in Tennessee. Graham, Jackson, and Madison Counties in North Carolina, and Monroe County in Tennessee, are also included in the experimental designation because of the close proximity of these counties to the Park boundary.

(iii) Except for the three island propagation projects and these small reintroduced populations, the red wolf is extirpated from the wild. Therefore, there are no other extant populations with which the refuge or Park experimental populations could come into contact.

(10) The reintroduced populations will be monitored closely for the duration of the project, generally by use of radio telemetry as appropriate. All animals will be vaccinated against diseases prevalent in canids prior to release. Any animal that is determined to be sick, injured, or otherwise in need of special care, or that moves off Federal lands, will be immediately recaptured by Service and/or Park Service and/or designated State wildlife agency personnel and given appropriate care. Such animals will be released back to the wild on the refuge or Park as soon as possible, unless physical or behavioral problems make it necessary to return the animals to a captive-breeding facility.

(11) The status of the Alligator River National Wildlife Refuge project will be reevaluated by October 1, 1992, to determine future management status and needs. This review will take into account the reproductive success of the mated pairs, movement patterns of individual animals, food habits, and overall health of the population. The duration of the first phase of the Park project is estimated to be 10 to 12 months. After that period, an assessment of the reintroduction potential of the Park for red wolves will be made. If a second phase of reintroduction is attempted, the duration of that phase will be better defined during the assessment. However, it is presently thought that a second phase would last for 3 years, after which time the red wolf would be treated as a resident species within the Park. Throughout these pe-

riods, the experimental and nonessential designation of the animals will remain in effect.

* * *

(7)

Supreme Court, U.S.
FILED
JAN 19 2001

No. 00-844

In the Supreme Court of the United States

CHARLES GILBERT GIBBS, ET AL., PETITIONERS

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether restrictions on the taking of endangered red wolves, imposed pursuant to Section 9(a)(1) of the Endangered Species Act of 1973, 16 U.S.C. 1538(a)(1), and implementing regulations, are a permissible exercise of Congress's authority under the Commerce Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-55a) is reported at 214 F.3d 483. The opinion of the district court (Pet. App. 58a-69a) is reported at 31 F. Supp. 2d 531.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2000. A petition for rehearing was denied on August 25, 2000 (Pet. App. 56a-57a). The petition for a writ of certiorari was filed on November 22, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Endangered Species Act of 1973 (ESA or Act), 16 U.S.C. 1531 *et seq.*, mandates protection and conservation measures for species of fish or wildlife determined to be endangered or threatened. Administration of the ESA is divided between the Fish and Wildlife Service (FWS) in the Department of the Interior and the National Marine Fisheries Service (NMFS) in the Department of Commerce. See 16 U.S.C. 1532(15); 50 C.F.R. 402.01(b).

The ESA authorizes the Secretary of the Interior or of Commerce to list domestic or foreign species as endangered or threatened. 16 U.S.C. 1533(a).[1] Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), requires all federal agencies to avoid actions that are likely to "jeopardize the continued existence of any endangered species" and to consult with either FWS or NMFS on fulfilling these obligations. Section 9(a)(1) of the Act, 16 U.S.C. 1538(a)(1), prohibits takings of endangered species by all persons who do not have a permit or other authorization. Under the ESA, the term "take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19); see also 50 C.F.R. 17.3 (definition of "harass"); *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (upholding regulation defining "harm" for purposes of "take" prohibition).

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[1] An endangered species is one that is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. 1532(6). A threatened species is one that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. 1532(20).

Under Section 10(j)(2)(A) of the ESA, FWS is authorized to introduce an "experimental population" of a listed species outside the species' current range, if the agency determines that such a release would further the conservation of the species. 16 U.S.C. 1539(j)(2)(A). Congress added Section 10(j) to the ESA in 1982 in response to testimony by fish and wildlife agencies that political opposition had frequently frustrated the reintroduction of species that might create conflicts with human activities. The House Report explained:

> Another shortcoming of the Act is its tendency to discourage voluntary introduction of species in areas of their historical range. State fish and wildlife agencies had probed the feasibility of introducing such experimental populations, but they feared political opposition to reintroducing species unless some assurances were simultaneously extended to prevent the creation of Endangered Species Act problems. In order to mitigate fears expressed by industry that such experimental populations would halt development projects, the Committee defined what an experimental population is and how it shall be treated under the Act.

H.R. Rep. No. 567, 97th Cong., 2d Sess. Pt. 1, at 17 (1982) (1982 House Report). Congress specifically identified the reintroduction of red wolves as the kind of recovery program that it intended to benefit by the enactment of Section 10(j):

> The Committee also expects that, where appropriate, the [experimental population] regulations could allow for the directed taking of experimental populations. For example, the release of experimental populations of predators, such as red wolves, could allow for the taking of these animals if depredations

> occur or if the release of these populations will continue to be frustrated by public opposition.

Id. at 34.

In order to increase FWS's flexibility and discretion in managing reintroduced endangered species, Section 10(j)(2)(C) provides that members of an experimental population are to be treated as "threatened." 16 U.S.C. 1539(j)(2)(C). Treatment of the species as "threatened" rather than "endangered" allows FWS the discretion to determine which of the Section 9(a)(1) prohibitions shall apply. See 16 U.S.C. 1539(j)(2)(C), 1533(d).[2]

As the 1982 House Report explained, Congress assigned to FWS the authority to promulgate regulations governing takings of reintroduced experimental populations in order to

> provide a vehicle for the development of special regulations for each experimental population that will address the particular needs of that population. Each experimental population is to be treated as a threatened species under the Act which grants the Secretary broad flexibility in promulgating regulations to protect such species. These regulations can even allow the taking of threatened animals. The Committee fully expects that there will be instances

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[2] The ESA further requires that before designating any population as "experimental," FWS must make a determination as to whether the population is "essential" to the continued existence of a threatened or endangered species. 16 U.S.C. 1539(j)(2)(B). If FWS finds that the individuals are "nonessential" to the continued existence of the species in question, additional management flexibility is permitted, since nonessential experimental individuals located outside national wildlife refuges or national park lands are exempt from some of the consultation requirements of Section 7 of the ESA, 16 U.S.C. 1536. 16 U.S.C. 1539(j)(2)(C).

> where the regulations allow for the incidental take of experimental populations, such as the inadvertent taking of experimental fish species by those fishing for other species in the same body of water.

1982 House Report 34.

2. The red wolf, *Canis rufus*, was once abundant throughout the southeastern United States, from the Atlantic coastal States westward to central Texas and Oklahoma and from the Gulf of Mexico northward to Missouri and Illinois. 51 Fed. Reg. 41,791 (1986). The available evidence suggests that the red wolf was "common in the vast pristine bottomland riverine habitats of the southeast, and especially numerous in and adjacent to the extensive 'canebrakes' that occurred in these habitats." *Ibid.* The dramatic reduction in the red wolf's numbers is directly attributable to the human-induced changes to the southeastern landscape caused by such activities as dam construction (which inundated prime habitat), the drainage of wetland areas for agricultural purposes, and the killing of wolves both by private individuals and by state and federal officials. *Ibid.*

The red wolf was listed as an endangered species in 1967, see 32 Fed. Reg. 4001, and is currently considered one of the most endangered mammals in North America, see C.A. App. 266. Until the reintroduction program that is the subject of this case, there had been no red wolves in the wild since the mid-1970s, when FWS was forced to round up the last remaining wild population in a desperate attempt to save the species from extinction. 51 Fed. Reg. 41,791 (1986). That small remnant population faced numerous threats, including disease, parasitism, and genetic inbreeding due to its precariously low numbers. *Ibid.* Immediately upon

rescuing those wolves, FWS began an intensive captive breeding program aimed at conserving the population's genetic vitality. The goal at the time was eventually to reintroduce individual wolves into the wild in an effort to establish new, self-sustaining populations. *Ibid.*

In 1986, FWS identified the 120,000 acre Alligator River National Wildlife Refuge in northeastern North Carolina as ideal habitat for a reintroduction of the red wolf to its historical range. The reintroduction efforts began in 1987 with the release of four pairs of captive wolves into the Refuge. C.A. App. 99, 192. Between 1987 and 1992, a total of 42 wolves were released in the Refuge. *Id.* at 192.

In 1993, the northeastern North Carolina population was expanded through the release of animals in the Pocosin Lakes National Wildlife Refuge. C.A. App. 193.[3] As of 1997, 72 captive-born red wolves had been released in northeastern North Carolina, with at least 135 pups born in the wild. See *id.* at 473-474. As of January 31, 1998, the total red wolf population in that area was estimated to be 77 (± 24%) animals. *Id.* at 489-491. The reintroduction area for that population is defined to include public and private land in Dare, Hyde, Tyrrell, Washington, and Beaufort Counties in North Carolina. 50 C.F.R. 17.84(c)(9)(i). In 1997, it was determined that over the course of the ten-year period

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[3] Beginning in 1991, a second reintroduction effort was initiated in the Great Smoky Mountains National Park, along the boundary between North Carolina and Tennessee. 56 Fed. Reg. 56,325 (1991). In 1998, that reintroduction program was terminated for a number of reasons, including an inadequate prey base within the Park and a concern that the wolves might interbreed with coyotes. Accordingly, the red wolves in the Park have been captured and relocated at several captive-breeding facilities. 63 Fed. Reg. 54,151 (1998).

that red wolves had been restored to northeastern North Carolina, there had been only 27 complaints involving red wolves in the area, of which only seven involved possible red wolf depredation. C.A. App. 474. As a result of FWS's conservation efforts, the total red wolf population increased from 75 captive animals in 1985 to a total 1997 population of between 251 and 334 animals, of which 195 were captive and the remainder wild. *Id.* at 99, 473.

Pursuant to Section 4(d) of the ESA, 16 U.S.C. 1533(d), FWS has promulgated special regulations governing those reintroduced populations. 50 C.F.R. 17.84(c). Under those regulations, the taking of red wolves is permitted on property owned or managed by any local, state, or federal governmental body if "such taking is incidental to lawful activities, is unavoidable, unintentional, and not exhibiting a lack of reasonable due care, or is in defense of that person's own life or the lives of others." 50 C.F.R. 17.84(c)(4)(ii). The taking of red wolves on private property is permitted if "such taking is not intentional or willful, or is in defense of that person's own life or the lives of others." 50 C.F.R. 17.84(c)(4)(i). Private landowners are also permitted to take red wolves "when the wolves are in the act of killing livestock or pets, *Provided* that freshly wounded or killed livestock or pets are evident." 50 C.F.R. 17.84(c)(4)(iii). A private landowner may also "harass red wolves found on his or her property * * *, *Provided* that all such harassment is by methods that are not lethal or physically injurious to the red wolf." 50 C.F.R. 17.84(c)(4)(iv). Finally, a private landowner may engage in conduct that would otherwise constitute a prohibited taking "after efforts by project personnel to capture such animals have been abandoned, *Provided* that the Service project leader or biologist has ap-

proved such actions in writing." 50 C.F.R. 17.84(c)(4)(v).

3. Petitioners are two counties and two private landowners in eastern North Carolina. They filed suit in federal district court, seeking a declaration that the restrictions on takings of red wolves in eastern North Carolina exceed Congress's power under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. Petitioners also sought an injunction against continued enforcement of those restrictions on non-federal land.

The district court granted the government's motion for summary judgment. Pet. App. 58a-69a. The court held that the protection of red wolves has a sufficient connection to interstate commerce to permit congressional regulation under the Commerce Clause. *Id.* at 63a-69a. The court explained:

> [The government] ha[s] demonstrated that tourists do cross state lines to see the red wolf, and that these tourists have an impact on commerce. [The government] ha[s] further demonstrated that red wolves are to be found in several States, and that some of the red wolves of Eastern North Carolina either have crossed state lines or may cross state lines in the future. All of these actions have economic consequences, as tourists, academics, and scientists follow the red wolves. Unrestricted taking of red wolves on private land would present a clear threat to this commerce.

Id. at 67a (footnotes omitted).

4. The court of appeals affirmed. Pet. App. 1a-55a. The court of appeals analyzed the case under the framework articulated by this Court in *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000). The court held that the

challenged restrictions on the taking of red wolves are a constitutional exercise of Congress's power to regulate activities that "substantially affect interstate commerce." Pet. App. 14a (quoting *Lopez*, 514 U.S. at 559).

The court explained that "[t]he taking of red wolves implicates a variety of commercial activities and is closely connected to several interstate markets." Pet. App. 14a. It observed, as an initial matter, that "[t]he protection of commercial and economic assets is a primary reason for taking the wolves," since "[f]armers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops." *Id.* at 15a. The court found other connections to interstate commerce as well, explaining that "with no red wolves, there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts." *Id.* at 15a-16a. The court concluded that "[w]hile the taking of one red wolf on private land may not be 'substantial,' the takings of red wolves in the aggregate have a sufficient impact on interstate commerce" to satisfy constitutional requirements. *Id.* at 16a.

The court of appeals also found the challenged provisions to be consistent with traditional conceptions of the appropriate division between federal and state authority. The court explained that "[g]iven the history of federal regulation over wildlife and related environmental concerns, it is hard to imagine how this anti-taking regulation trespasses impermissibly upon traditional state functions—either control over wildlife or local land use." Pet. App. 33a. The court concluded that "[i]n contrast to gender-motivated violence or guns in school yards [at issue in *Morrison* and *Lopez*], the conservation of scarce natural resources is an appropriate and well-recognized area of federal regulation. The

federal government has been involved in a variety of conservation efforts since the beginning of this century." *Id.* at 33a-34a.

Judge Luttig dissented. Pet. App. 46a-55a. Relying principally on this Court's decisions in *Lopez* and *Morrison*, Judge Luttig concluded that the challenged restrictions on red wolf takings exceed Congress's power under the Commerce Clause. Judge Luttig explained that in his view, "[t]he killing of even all 41 of the estimated red wolves that live on private property in North Carolina would not constitute an economic activity of the kind held by the Court in *Lopez* and in *Morrison* to be of central concern to the Commerce Clause, if it could be said to constitute an economic activity at all." *Id.* at 50a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. As petitioners acknowledge (Pet. 20), the courts of appeals have uniformly sustained the constitutionality of the prohibition on takings of listed species established by Section 9 of the ESA, 16 U.S.C. 1538. See Pet. App. 1a-46a (upholding restrictions on takings of red wolves); *National Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (upholding application of ESA Section 9 to the Delhi Sands Flower-Loving Fly), cert. denied, 524 U.S. 937 (1998). See also *United States* v. *Bramble*, 103 F.3d 1475 (9th Cir. 1997) (upholding the constitutionality of the Bald Eagle Protection Act); *Building Indus. Ass'n of Superior Cal.* v. *Babbitt*, 979 F. Supp. 893 (D.D.C. 1997) (upholding application of ESA Section 9 to fairy shrimp regu-

lation), appeal pending, No. 00-5143 (D.C. Cir.); *Palila* v. *Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979) (upholding the application of ESA Section 9 to Hawaiian bird species), aff'd, 639 F.2d 495 (9th Cir. 1981). Indeed, to our knowledge no court—either before or after this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995)—has invalidated any federal wildlife legislation as exceeding the reach of Congress's power under the Commerce Clause.[4]

2. The court of appeals correctly held that the challenged restrictions on takings of endangered red wolves have a sufficient connection to interstate commerce to support congressional regulation under the Commerce Clause.

a. Petitioners suggest (Pet. 14) that the challenged restrictions on red wolf takings are the product solely of "administrative regulations." That is incorrect. Section 9(a)(1) of the ESA, 16 U.S.C. 1538(a)(1), broadly prohibits takings of endangered species. Although FWS has promulgated regulations focusing specifically on the reintroduced red wolf population at issue here, the effect of those regulations is to *authorize* takings of red wolves in some circumstances where the ESA would otherwise proscribe such conduct. See Pet. App. 30a ("Without these special regulations, all red wolves would be subject to the absolute taking prohibition of

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[4] In *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), decided shortly after *Lopez*, this Court held that the Secretary of the Interior had reasonably construed the term "harm," as used in the ESA's definition of "take," to include habitat modification that would kill or injure members of a listed species. No member of the Court suggested that the ESA, so construed, might exceed Congress's power under the Commerce Clause.

section 9(a), placing a much greater burden on the property owner."); 51 Fed. Reg. 41,792 (1986) (explaining that designation of the red wolves as an experimental population "enables the [FWS] to adopt a special rule which is less restrictive than the mandatory prohibitions covering endangered species"). Although petitioners have consistently characterized their suit as a challenge to the "red wolf regulation," that administrative rule does not subject them to any disability beyond those imposed by the Act itself. Petitioners' constitutional claim therefore necessarily depends on the proposition that Congress lacks power to enact the basic prohibition on takings of endangered species contained in Section 9(a)(1) of the ESA.

b. As the court of appeals correctly held, "[t]he taking of red wolves implicates a variety of commercial activities," Pet. App. 14a, and "the effect of the takings on these varied activities in combination qualifies as a substantial one," *id.* at 17a. First, the taking of red wolves is typically undertaken to protect commercial and economic assets, and the record in this case demonstrates that petitioners' primary concern has been the perceived threat posed by wolves to livestock. See C.A. App. 8 (complaint); *id.* at 422 (Hyde County resolution noting concerns regarding livestock); *id.* at 424 (similar Hyde County resolution); Pet. C.A. Br. 11 (noting concerns about "inadequate protection of humans and livestock"). The court of appeals therefore correctly found that "[t]he protection of commercial and economic assets is a primary reason for taking the wolves. Farmers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops." Pet. App. 15a.

Second, the existing red wolf population is the subject of observation and study, both by tourists and by scientific researchers, that entail substantial interstate travel and commercial activity. The record in this case shows that tourists travel to North Carolina from throughout the country for "howling events" at the refuge. Pet. App. 17a; C.A. App. 793-839 ("howling" information and visitor logs); *id.* at 840 (list of red wolf program volunteers 1986-1998). As the court of appeals noted, a study by a Cornell University professor indicated that the red wolf program could result in a significant regional economic impact. Pet. App. 17a; see C.A. App. 633 (economic study). The court also explained that the "red wolf reintroduction program has already generated numerous scientific studies." Pet. App. 20a.

Third, the protection of existing red wolves preserves the possibility of a restored commerce in fur pelts. See Pet. App. 20a. The goal of the ESA is not simply to keep endangered species on the razor's edge between survival and extinction, but to assist in recovering the species to the point that it no longer requires extraordinary protection. See, *e.g.*, 16 U.S.C. 1533(f) (recovery plans); see generally Jason M. Patlis, *Recovery, Conservation, and Survival Under the Endangered Species Act: Recovering Species, Conserving Resources, and Saving the Law*, 17 Pub. Land & Resources L. Rev. 55, 56 (1996) (ESA "seeks not only to arrest the decline of those species on the brink of extinction, but to bring about their recovery so that they can assume their natural role in the ecosystem"). Although the ESA proscribes certain forms of interstate commerce (*e.g.*, the harvesting and sale of pelts) in an endangered species for so long as the species remains listed, the Act's protective measures may nevertheless serve, in the long term, to facilitate future

commerce in the species after recovery efforts are complete.[5] See *Palila*, 471 F. Supp. at 995 (explaining that "a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species"); cf. *Bramble*, 103 F.3d at 1481 (upholding the Bald Eagle Protection Act, 16 U.S.C. 668 *et seq.*, as a valid exercise of Commerce Clause authority, and observing that "[e]xtinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity," including "future commerce in eagles or their parts").

Finally, petitioners' demand for specific proof of the red wolf's near-term commercial importance ignores two central (and related) premises of the ESA: that individual species are part of an interdependent web, and that the significance of a particular species cannot always be easily determined at a given point in time. Section 9(a)(1)(B) of the ESA regulates takings of all species that have met the strict criteria for listing by FWS or NMFS as endangered or threatened. 16 U.S.C. 1538(a)(1)(B). "In the aggregate, * * * we can be certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce." *National Ass'n of Home Builders*, 130 F.3d at 1053-1054 (opinion of Wald, J.). A focus on the aggregate commercial significance of all listed species is particularly appropriate in light of

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[5] As the court of appeals observed (Pet. App. 21a), the American alligator was once listed as an endangered species but has now recovered to the point at which a robust market in alligator hides exists. The potential for a restored commerce in red wolves is also plausible. Grey wolves in Minnesota are likely to be delisted soon; when that occurs, management will be returned to the State, which may choose to permit the hunting of its wolves. See *id.* at 40a.

(1) the difficulty of identifying *ex ante* the commercial potential of a particular species, and (2) the fact that extirpation of a species eliminates for all time the possibility of future commercial uses.

In resolving questions concerning the proper construction of the ESA, this Court has recognized Congress's concern "about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet." *TVA* v. *Hill*, 437 U.S. 153, 178-179 (1978). The Court in *TVA* v. *Hill* relied on the Act's legislative history, which emphasized the "*incalculable*" value of endangered species as "potential resources" and "keys to puzzles which we cannot solve." *Id.* at 178 (quoting H.R. Rep. No. 412, 93d Cong., 1st Sess. 4-5 (1973) (1973 House Report)). Precisely because extinction of an endangered species may have irremediable consequences that cannot readily be foreseen, the few remaining members of the species are appropriately regarded as a valuable national resource. As the court of appeals observed, "[i]t would be perverse indeed if a species nearing extinction were found to be beyond Congress's power to protect while abundant species were subject to full federal regulatory power." Pet. App. 28a.

3. Petitioners contend (Pet. 27-28) that the challenged restrictions on red wolf takings are not a valid exercise of federal authority because the "[r]egulation of wild animals * * * remains a matter of state concern that is outside the powers conferred on Congress." That claim is without merit.

"Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises

one of its enumerated constitutional powers." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (quoted at Pet. App. 31a); see *Missouri* v. *Holland*, 252 U.S. 416 (1920) (sustaining Migratory Bird Treaty Act against challenges that it exceeded Congress's treaty-making powers and infringed on powers reserved to the States under the Tenth Amendment); *Douglas* v. *Seacoast Prods., Inc.*, 431 U.S. 265, 281-282 (1977) (Congress has power under the Commerce Clause to regulate the taking of fish from state waters, thus preempting conflicting state laws). Thus, unlike the federal statutes struck down by this Court in *Lopez* and *Morrison*, the ESA's take prohibition does not "plow[] thoroughly new ground" or "represent[] a sharp break with the long-standing pattern" of federal regulation. *Lopez*, 514 U.S. at 563 (citation omitted). Rather, "[i]n contrast to gender-motivated violence or guns in school yards, the conservation of scarce natural resources is an appropriate and well-recognized area of federal regulation." Pet. App. 33a-34a; see *id.* at 33a-35a (discussing history of federal wildlife conservation efforts).

4. The court of appeals correctly recognized that protection of endangered species from takings on private land is essential to the achievement of the ESA's objectives. The court explained:

> If the federal government cannot regulate the taking of an endangered or threatened species on private land, its conservation and preservation efforts would be limited to only federal lands. A ruling to this effect would place in peril the entire federal regulatory scheme for wildlife and natural resource conservation.

Pet App. 42a. According to the General Accounting Office, in 1993 there were 781 species listed under the ESA, nearly three-quarters of which had more than 60% of their habitat on non-federal land. *Id.* at 38a; C.A. App. 1370. As the court of appeals explained, predecessors to the ESA enacted in 1966 and 1969 "initially targeted conservation efforts only on federal lands, but they met with limited success." Pet. App. 19a; see 1973 House Report 5 ("Clearly it is beyond our capability to acquire all the habitat which is important to those species of plants and animals which are endangered today, without at the same time dismantling our own civilization."); *Sweet Home*, 515 U.S. at 698. Because the ESA was prompted in part by the demonstrated "need to extend takings regulation beyond the limited confines of federal land," Pet. App. 19a, there is no basis for petitioners' suggestion (Pet. 28-29) that the Act's objectives could be achieved solely through exercises of Congress's spending power and its authority over federal property.

5. This Court's decision in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, No. 99-1178 (Jan. 9, 2001), does not cast doubt on the court of appeals' decision in this case. The Court in *Solid Waste Agency* concluded that the assertion of federal regulatory jurisdiction over ponds not connected to any navigable-in-fact water body, based on the use of the ponds as habitat by migratory birds, would raise significant constitutional concerns. See slip op. 12-13. The Court ultimately issued no constitutional holding, however, finding instead that the Army Corps of Engineers' assertion of regulatory jurisdiction over the ponds in question was unauthorized by the Clean Water Act. *Id.* at 13-14.

In any event, the constitutional concerns identified by the Court in *Solid Waste Agency* are inapplicable here. The Court in that case found that the Army Corps' regulatory approach raised potential constitutional difficulties because it would "readjust the federal-state balance" and "result in a significant impingement of the States' traditional and primary power over land and water use." Slip op. 13. The ESA, however, does not readjust the federal-state balance, because as explained above (see pp. 15-16, *supra*), the protection of wildlife has historically been the subject of federal regulation as well. Moreover, the red wolf take restrictions at issue in this case cannot meaningfully be characterized as land-use regulation. They impose no broad constraints on the acceptable uses of particular tracts, but instead prohibit (with certain exceptions) the intentional taking of members of an animal species of particular national concern.[6] Nothing in *Solid Waste Agency* suggests that the establishment of that prohibition is beyond Congress's authority.

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[6] As we explain above (see note 4, *supra*), FWS regulations construing the basic ESA take prohibition extend that ban to habitat modification that actually kills or injures a member of a listed species. Thus, under some circumstances, the ESA take prohibition may apply to conduct that is not intended to harm any member of a listed species but in fact has that consequence. The regulation governing the red wolf reintroduction program provides, however, that "[a]ny person may take red wolves found on private land in the" defined reintroduction areas, so long as "such taking is not intentional or willful." 50 C.F.R. 17.84(c)(4)(i); cf. pp. 11-12, *supra* (explaining that the effect of the red wolf regulation is to authorize some conduct that Section 9(a)(1) of the ESA would otherwise prohibit).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 00-844

In the Supreme Court of the United States

CHARLES GILBERT GIBBS, *et al.*,
Petitioners,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF AMICUS CURIAE FOR THE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Commerce Clause authorizes the federal government to criminalize or otherwise regulate wholly intrastate, noncommercial interactions between humans and wild animals on private property.

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INTEREST OF THE AMICUS CURIAE*

The National Association of Home Builders (NAHB) represents 203,000 builder and associate members throughout the United States and is affiliated with some 850 state and local associations in all 50 states. NAHB's members include not only people and firms that construct and supply single family homes, condominiums, and apartments, but also commercial and industrial builders, remodelers, land developers, and land planners. NAHB is the voice of the American shelter industry.

NAHB's members are vitally dependent upon their ability to make economic use of their land free from unreasonable federal restrictions, whether those restrictions are imposed under the Endangered Species Act, as in this case, the Clean Water Act, or other federal regulatory schemes. Accordingly, NAHB has participated in this Court as an *amicus* or a party in cases questioning the constitutional propriety, under the Commerce Clause, of federal restrictions on land use. See, e.g., *National Association of Home Builders* v. *Babbitt*, No. 97-1451; *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, No. 99-1178.

The federal prohibition on the "taking" of members of threatened or endangered species has been very broadly defined to extend to "habitat modification" and other activities that "harm" the listed animal or plant, including by interfering with its feeding, breeding, or other habits. See *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). As a result, the taking prohibition greatly impacts a landowner's ability to develop the land or to make *any* economic use of it that conflicts with the needs or preferences of the listed species.

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* This brief was not written in whole or in part by counsel for any party and no one other than NAHB made a monetary contribution to its preparation. The written consents of the parties to the filing of this brief have been filed with the Clerk.

For residential and commercial developers, the presence of an endangered or threatened species on land either rules out development altogether or forces the developer into costly and time consuming administrative and court proceedings. See, e.g., *National Association of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (construction of a public hospital was halted, at a cost of more than $3.5 million to taxpayers, and improvement of a critical traffic intersection to serve the hospital was prevented, because the project would interfere with the habitat of the Delhi Sands Flower-Loving Fly); Cf. *City of Monterey* v. *Monterey Dunes, Ltd.*, 526 U.S. 687 (1999) (possible presence of Smith's Blue Butterfly habitat barred residential development through five years of administrative proceedings and 13 years of litigation). These costs and delays in turn impact housing affordability and availability. See Advisory Commission on Regulatory Barriers to Affordable Housing, *"Not In My Backyard": Removing Barriers to Affordable Housing* (1991) ("environmental protection legislation and associated regulations * * * often unnecessarily raise the cost of housing").

The NAHB believes that it can illuminate the need for this Court's immediate review of the question presented in the petition and the harmful consequences of leaving the Fourth Circuit's erroneous decision in this case unreviewed. Allowing the federal government to determine what a person may legitimately do on his or her own property, when that conduct bears no substantial relation to interstate commerce, is flatly at odds with this Court's recent decisions concerning the scope of the commere power. It is not what the Framers of our Constitution contemplated when they conceived a federalist scheme of limited, enumerated federal powers and reserved state authority.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Department of the Interior regulation at issue in this case prevents landowners in eastern North Carolina from harassing, harming—even modifying the habitats—of red wolves that are located on private land. Pet. App. 6a; 50 C.F.R. § 17.84(c)(2). The red wolf does not inhabit eastern North Carolina as a result of natural migration, but has been reintroduced to the State by the federal government. Pet. App. 5a. Of the approximately 75 red wolves that now live in North Carolina, over one-half, about 41 wolves, now reside on private land. *Ibid.* The Secretary's "takings" regulation prevents landowners from interfering with the red wolves living on their land, despite the obvious threat that wolves pose to the personal safety of landowners and their families and to the safety of household pets and livestock, and despite the severe interference with property rights that occurs when landowners may not use their property as they wish because to do so would interfere with the red wolf's preferences. Recognizing these problems, the State of North Carolina has adopted a law to "allow the trapping and killing of red wolves by owners of private land." 1994 N.C. Sess. Laws Ch. 635; Pet. App. 7a, 62a-63a.

After passing resolutions opposing the reintroduction of red wolves, two North Carolina counties, joined by two individual plaintiffs, challenged the takings regulation as exceeding Congress' power under the Commerce Clause. The Fourth Circuit upheld the regulation as a valid exercise of the commerce power.

The majority, over Judge Luttig's dissent, first concluded that "the taking of a red wolf on private land" is itself "economic activity" because "[t]he protection of commercial and economic assets is a primary reason for taking the wolves. Farmers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable

livestock and crops." Pet. App. 15a. Because the taking of red wolves was economic activity, the majority held, it could be aggregated under *Wickard* v. *Filburn*, 317 U.S. 111 (1942), to arrive at the "significant" impact on commerce essential under this Court's decisions to justify federal regulation.

In the alternative, the majority held, the regulation was within the commerce power because it "is closely connected to a variety of interstate commercial activities"—namely "red wolf related tourism," "scientific research," and "commercial trade in [wolf] pelts." Pet. App. 15a-16a. The court considered it enough that red wolves might one day produce significant tourism to North Carolina, that scientific research might one day find a commercial use for wolves, or that trade in wolf pelts might one day be reestablished. *Id.* at 17a-20a.

I. The Fourth Circuit's decision cannot be reconciled with this Court's recent precedents or any reasonable conception of the federal government as one of limited, enumerated powers. In striking down federal statutes in *United States* v. *Morrison*, 120 S. Ct. 1740 (2000), and *United States* v. *Lopez*, 514 U.S. 549 (1995), this Court emphasized that the commerce power is subject to real limits and cannot be stretched to reach every matter in which the federal government claims there is some national interest. Contrary to this Court's careful articulation in *Lopez* and *Morrison* of those limits on the commerce power, the Fourth Circuit majority here upheld federal regulation of purely intrastate activity that cannot itself plausibly be regarded as commercial, and that has no discernible impact on interstate commerce except through a lengthy and impermissibly speculative chain of causation.

First, the majority by fiat declared that conduct that is merely *associated* with economic activity in *some instances* is itself "economic activity" sufficient to trigger *Wickard* aggregation. We explain in Part I that this Court has made clear that the Commerce Clause permits the regulation of purely intrastate

conduct "only where that activity is economic in nature." *Morrison*, 120 S. Ct. at 1751. The Fourth Circuit majority vastly expanded the concept of "economic activity" to include activity that is not economic itself, but that is in some way related to an economic transaction. That expansive view of the commerce power would extend federal authority to reach local and domestic activities and would eliminate all distinctions between the proper subjects of state and federal regulation.

Second, the court of appeals found the takings regulation justified by the mere speculative possibility of wolf tourism, scientific research about the red wolf, and trade in wolf pelts. But as this Court explained in *Lopez*, an activity does not "substantially affect" interstate commerce if one must "pile inference upon inference" to establish a nexus between the regulated activity and interstate commerce. 514 U.S. at 567. Instead, the Constitution requires some "concrete tie to interstate commerce"—something that is singularly lacking in this case. *Ibid.*

II. In addition, the lower courts have been seriously divided about the proper scope of Congress' power to restrict private action on private land in order to protect wildlife that has no established commercial utility or effect. The application of federal power to species that are not commercially exploited and that do not substantially affect commerce calls for this Court's immediate review to provide guidance to the lower courts.

III. The Fourth Circuit's decision is particularly subversive of this Court's efforts to restore the Commerce Clause to a meaningful constraint on federal authority. This Court's decision in *Lopez* had remarkably little impact in the lower federal courts, which paid lip service to that ruling while repeatedly upholding federal regulations with no effect on interstate commerce. The Fourth Circuit's post-*Morrison* decision in this case—a decision from which Judge Luttig

vigorously dissented on the ground that the majority's "conclusions are not even arguably sustainable under *Lopez* [and] *Morrison*"—demonstrates that even the reiteration in *Morrison* of outer boundaries to the commerce power has not been enough to convince lower courts that federal authority is constrained. The majority below continued to maintain a rearguard action against the logic of *Lopez* and *Morrison*, employing precisely the same tenuous and conjectural theories about how activities affect commerce that this Court has now twice rejected. This Court should grant review to correct the lower courts' tendencies to distort and manipulate the Commerce Clause tests in *Lopez* and *Morrison*.

Review is also appropriate now because determining the propriety of federal prohibitions on taking listed species, on private land, when those species have no commercial use or impact is of enormous practical importance to *amicus* home builders and to all landowners. The presence of an endangered species on private land delays or halts the development of land and causes substantial additional expense for private landowners and developers who are prevented from taking rational steps to manage or remove the protected species. Were the prohibitions at issue in this case not unconstitutional under the Commerce Clause, they would constitute a physical taking of private property that would require just compensation under the Fifth Amendment.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE FOURTH CIRCUIT'S RULING SQUARELY CONFLICTS WITH THIS COURT'S DECISIONS IN *LOPEZ* AND *MORRISON*

This Court's recent ruling in *Morrison* underscored what the Court had firmly announced in *Lopez*: that "even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds."

Morrison, 120 S. Ct. at 1748. After *Morrison*, there can be no doubt that the federal government may not regulate purely local, non-commercial activity when the impact of that activity on interstate commerce may be deemed "substantial" only through a creative chain of speculation and inferences. Yet this is precisely what the court of appeals in this case permitted the Secretary to do. The court of appeals' impermissible expansion of the Commerce Clause, on an issue of vital importance to private landowners and to our Nation's polity, calls for this Court's intervention.

A. The Fourth Circuit Erred In Concluding That Red Wolf Taking Is Economic Activity Under This Court's Standards In *Lopez* And *Morrison*

This Court has made clear that Congress' exercise of its commerce power must have as its purpose the regulation of *commercial* activity. "[T]hus far in our Nation's history, our cases have upheld commerce clause regulation of intrastate activity only where that activity is *economic in nature*." *Morrison*, 120 S. Ct. at 1751 (emphasis added). It is not enough for the regulated activity to be connected in some general sense to an economic enterprise; instead, the particular regulated activity must itself be commercial in nature. See *Lopez*, 514 U.S. at 565 (observing that "depending on the level of generality, any activity can be looked upon as commercial").

While the majority of the Fourth Circuit paid lip service to this principle, it strained it beyond the breaking point when it held that taking red wolves is "in a meaningful sense economic activity" because "[t]he protection of commercial and economic assets"—livestock and crops—"is a primary reason for taking the wolves." Pet. App. 15a. The fact that, in some cases, "farmers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops" (*ibid.*), does not make the taking of red wolves commercial activity under the standards set forth in

Morrison or *Lopez*. The Secretary's regulation is not limited to takings to protect cattle or livestock or other commercial assets. To the contrary, it applies broadly to all red wolf takings in North Carolina, regardless of the reason for the taking, so long as they do not fall within a few specified exceptions. See 50 C.F.R. § 17.84(c). Without an "'express jurisdictional element which might limit its reach to a discrete set of [takings] that additionally have an explicit connection with or effect on interstate commerce'" (*Morrison*, 120 S. Ct. at 1751), the fact that the red wolf takings could, in some cases, have an economic purpose, broadly conceived, is irrelevant.

Beyond that, the notion that anything done to protect and promote commerce is itself commercial activity goes much too far. If every such activity were within the commerce power, the federal government could regulate an enormous range of conduct, from personal savings earmarked for purchases, to any productivity-enhancing choice such as eating well or exercising, to scaring crows and mice away from seedling crops, to how much vacation a self-employed builder may take. Taken to its logical conclusion, the court of appeals' "protecting items in commerce" rationale would substantially overlap with and be just as expansive—and just as destructive of our constitutional order—as the "productivity" rationale rejected in *Lopez* and *Morrison*.

Putting aside this improper rationale, it is clear that taking red wolves is not commerce. There is no suggestion in the lower court's opinion, nor anywhere in the record, that the red wolf presently has a commercial value. The court explicitly acknowledged that any sort of commercial trade in pelts occurred "primarily in the nineteenth century" (Pet. App. 21a), and that there is no present market for red wolf products. The regulation "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however, broadly one might define those terms." *Lopez*, 514 U.S. at 561.

B. The Court Of Appeals Erred In Finding A Substantial Impact On Interstate Commerce Based On Speculative Future Commercial Effects.

The Court of Appeals also held that red wolf takings are within the commerce power because they "implicat[e] a variety of commercial activities": "red wolf tourism," "scientific research," and "commercial trade in red wolf pelts." Pet. App. 14a. In each case these supposed effects on commerce are speculative, not substantial. There is no evidence that red wolf tourism is significant, or that it would be impacted in any way by taking wolves on *private land*, where tourists may not go. See *id.* at 48a, 50a. That some few scientists study red wolves clearly does not amount to a substantial impact on commerce, and certainly not where there has been no showing whatever that the science involved has commercial applications of any kind. See *id.* at 48a-49a. There is no trade in wolf pelts, and there has been none since the 1800s. See *id.* at 49a. And it is purely speculative to suppose that even if *all* 41 wolves located on private land were taken, commerce would be *substantially* affected when about an equal number of introduced red wolves remain on public land.

In any event, looking to the three "effects on commerce" identified by the court of appeals stretches the concept of "economic activity" so far beyond true "'commercial intercourse'" (*Lopez*, 514 U.S. at 553) as to make the concept essentially meaningless. To find each supposed commercial effect the court had to "pile inference upon to inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power." *Lopez*, 514 U.S. at 567.

For example, the majority's reasons for finding an impact on interstate tourism involves the following steps: *If* none of the 41 wolves living on private land are taken, this *could* lead to "the recovery of the red wolf and increased visitor activities" (Pet.

App. 17a), which *might* lead to an increase in tourist dollars spent in North Carolina, which "*could* result in a significant regional economic impact." *Id.* (emphasis added). Each of the court's other rationales involve an equally fanciful "but-for causal chain from the initial [taking] * * * to every attenuated effect upon interstate commerce." *Morrison*, 120 S. Ct. at 1752. As Judge Luttig observed in his dissent (Pet. App. 50a),

> [T]he number of inferences (not to mention speculation) necessary to discern * * * [by taking red wolves] a substantial effect on interstate commerce is exponentially greater than the number necessary in *Lopez* to show a substantial effect on interstate commerce from the sale of guns near schools or in *Morrison* to show a substantial effect an interstate commerce from domestic assault.

If the sort of remote and speculative connections to commerce relied on by the Fourth Circuit were enough to ground federal power, nothing would escape Washington's control. There is tourism related to every conceivable hobby and interest; virtually no human act goes unstudied by some scientist somewhere; and virtually every object may be sold or bartered at some point. On the Fourth Circuit's theory, *every* human endeavor would "implicat[e] a variety of commercial activities." Brushing one's teeth implicates the purchase of a toothbrush and toothpaste. The Fourth Circuit apparently would permit the federal government to regulate how many times a person brushes his or her teeth a day on the theory that that will affect how many toothbrushes and tubes of toothpaste will be purchased each year. The Fourth Circuit in this case failed to demand the "'close and substantial relation to interstate commerce'" that this Court has required. *Lopez*, 514 U.S. at 555; see, e.g., *Maryland* v. *Wirtz*, 393 U.S. 183, 196 n.27 (1968) ("a relatively trivial impact on commerce [may not be used] as an excuse for broad general regulation of state or private activities"); *Gulf Oil Corp.* v. *Copp Paving*, 419 U.S. 186, 198 (1974) (a "chain of connection" that "ha[d] no logical

endpoint" resulted in "nebulous" jurisdictional limits and did not provide an acceptable "'nexus' to commerce"); *FERC* v. *Mississippi*, 456 U.S. 742, 758 n.23 (1982) (Congress may not "regulate in an area that is only tangentially related to interstate commerce").

This Court in *Morrison* squarely rejected the notion that the Commerce Clause permits federal regulation of any local activity as long as there exists some conceivable connection, however tenuous, between the activity and interstate commerce. The decision of the court of appeals repudiates that principle, and would obliterate the "distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68. Stripped of the majority's spurious connections to interstate commerce, the regulation challenged here relates to a purely local, non-economic matter: taking a small number of artificially-introduced wolves, which are located solely in a small part of North Carolina, and which are located solely on private land. See Pet. App. 52a-53a.

II. OVER FREQUENT DISSENTS, THE LOWER COURTS HAVE NOT BEEN ABLE TO AGREE ON A COMMERCE CLAUSE BASIS FOR THE ESA'S BROAD TAKE PROHIBITIONS.

There is substantial disagreement among federal appeals court judges regarding whether the ESA's take provision is constitutional under the Commerce Clause. Each of the two decisions upholding the prohibition after *Lopez* includes a vigorous dissent. See Pet. App. 46a (Luttig, J., dissenting); *National Association of Home Builders* v. *Babbitt*, 130 F.3d at 1060 (Sentelle, J. dissenting). There is also substantial disagreement among those judges who believe that the take provision is within the commerce power as to the rationale for sustaining the provision. See Pet. App. 14a-26a; *National Association of Home Builders*, 130 F.3d at 1052 (Wald. J.); *id.* at 1058-59 (Henderson, J.) (setting forth three different theories). A third

case upholding the take provision as applied to wholly intrastate, non-commercial listed species is currently on appeal to the Fifth Circuit. *Shields* v. *Babbitt*, No. 99-CA-040 (W.D. Tex., July 12, 2000), appeal pending, No. 00-50839 (5th Cir.). Absent this Court's guidance, disagreements about this recurring issue will certainly continue.

The Fourth Circuit's decision in this case and the D.C. Circuit's decision in *National Association of Home Builders* have failed to produce any consensus about a constitutional rationale for wildlife taking. There is little consensus, even, about whether the appropriate Commerce Clause analysis lies under the "channels" or "effects" jurisdiction. Compare Pet. App. 11a (the Secretary's taking regulation "is 'not a regulation of the use of the channels of interstate commerce'") and *National Association of Home Builders*, 130 F.3d at 1058 ("The statutory protection of flies is not a regulation of the 'use of the channels of interstate commerce'") (Henderson, J., concurring) with *id.* at 1046 ("Application of [the statutory taking provision] to the Fly can be viewed as a proper exercise of Congress' Commerce Clause power over * * * the use of the 'channels of interstate commerce'") (Wald, J.).

Even where appellate judges can broadly agree that the taking prohibition has a substantial economic effect on interstate commerce, they cannot agree on the basis for their conclusions. The majority in this case, for example, found that the Secretary's regulation of red wolf takings had a substantial interstate commercial effect because such takings might affect future markets for wolves (either a tourist market, or a research market, or a market in wolf pelts). That future market, the court concluded, might one day have a substantial impact on interstate commerce. Pet. App. 17a-21a.

In contrast, Judge Wald in *National Association of Home Builders* found that application of the take provision to the Delhi Sands Flower-Loving Fly "prevents the destruction of

biodiversity and thereby protects the current and future interstate commerce that relies upon it." 130 F.3d at 1052. To reach this conclusion, Judge Wald looked at the effect of takings on *all* endangered species, not merely their effect on the Fly, and concluded that "the aggregate extinction of endangered species will have a substantial effect on interstate commerce." *Id.* at 1054 n.14. While Judge Henderson agreed in her concurrence that the takings prohibition could be upheld based on a biodiversity rationale, she concluded that the extinction of a single species was adequate to find a substantial impact on interstate commerce, "[g]iven the interconnectedness of species and ecosystems." *Id.* at 1059. Both Judge Wald's and Judge's Henderson's reasoning could have been applied equally well in this case (and in *any* case involving endangered or threatened species) to seek to justify federal regulation; *yet the Fourth Circuit adopted a different approach.*

Not only have the judges upholding statutory and regulatory take provisions failed to agree on a constitutional basis, but each of their opinions has been vigorously attacked by a dissenting judge. As Judge Luttig explained in his dissent in the present case, the majority's rationales for upholding the regulation "are not even arguably sustainable under *Lopez* [and] *Morrison*" Pet. App. 49a. Likewise, Judge Sentelle, in *National Association of Home Builders*, criticized the notion that Congress' may regulate purely intrastate takings of wildlife that have no inherent commercial value based "upon the purely speculative future impact of an action with no demonstrable impact at all." 130 F.3d at 1065; see also Pet. App. 50a ("The number [of inferences] (and the speculation) is even greater than that necessary in *Wickard* v. *Filburn*, 317 U.S. 111 (1942)"—a case this Court has described as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, 514 U.S. at 560). Despite extended discussion of this Court's precedents, federal appellate judges have not been able to apply the Court's standards in any coherent manner.

Given the diversity of opinion already on display among judges of the courts of appeals and the extensive opinions that already explore the issue presented in this case, there is no need for this Court to await a formal split among the circuits. This Court's review is necessary now to clear up the uncertainty pervading the lower courts, and to halt a vast and constitutionally unauthorized extension of federal power.

III. THE QUESTION PRESENTED IS IMPORTANT FOR OUR CONSTITUTIONAL ORDER AS WELL AS FOR PRIVATE LANDOWNERS

The Fourth Circuit's decision subverts this Court's efforts to restore the Commerce Clause as a meaningful constraint on federal power. The landmark decision in *Lopez* has had little impact in the lower federal courts, which continue to uphold federal regulation of activities with only remote effects on interstate commerce. Though one might have hoped that this Court's reaffirmation of the *Lopez* approach in *Morrison* would have brought home to the lower courts that rubber-stamping federal regulation is no longer appropriate, the decision below demonstrates that the message has not yet been driven home.

As Judge Luttig pointed out, the majority's opinion in this case was written by Judge Wilkinson, who had previously dissented from the Fourth Circuit decision that this Court affirmed in *Morrison*. Pet. App. 53a. In that dissent, Judge Wilkinson had characterized *Lopez* as an example of "contemporary judicial activism." See *ibid.* Perhaps not coincidentally, as Judge Luttig observed, "the expansive view of the Commerce Clause expressed by the majority [in this case] is closely akin to that separately expressed by Justice Breyer in his dissent in *Lopez* and Justice Souter in his dissent in *Morrison*." *Id.* at 51a. In a matter so important as the proper scope in our constitutional system of federal power over local matters, paying lip service to this Court's decisions while avoiding their necessary consequences should not be

tolerated—but will likely continue unless this Court intervenes to provide the lower courts with further guidance.

This case has not only substantial constitutional significance, but also immense practical importance to private landowners. The presence of any endangered or threatened species on private land either halts development completely or forces the landowner to engage in costly and time-consuming administrative proceedings (and litigation). See *National Association of Home Builders*, 130 F.3d at 1060 (construction of hospital derailed at cost of $3.5 million to taxpayers because the project might interfere with the listed Delhi Sands Flower-Loving Fly) (Sentelle, J., dissenting). The ESA's taking prohibitions put at risk both private economic and commercial development, including *amicus'* members efforts to provide affordable housing, and local public projects. See *ibid.* ("Construction planning and projects, including an electrical substation and housing developments, have also been threatened, impeded, or prohibited because of the fly"). Private development and public projects help local economies by creating jobs and increasing the local tax base; such benefits should not be lost to federal regulation that has absolutely no valid constitutional basis.

Amicus has already made known to this Court the harm to its members caused by such broad restrictions in its briefs in *National Association of Home Builders* v. *Babbitt*. So have small landowners and families dependent on the forest product industries. See *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 692 (1995). More recently, a federal district court in Texas found that landowners violated the ESA's take prohibition by pumping water from a local aquifer to irrigate farmland and feed livestock. *Shields* v. *Babbitt*, No. 99-CA-040, slip op. at 8 (W.D. Tex., July 12, 2000). Because withdrawal of the water "alter[ed] the aquatic habitat" of several endangered species, the Court concluded that the use of water from the aquifer constituted a taking under

the ESA. *Id.* at 4. No industry or individual dependent on the use of land for a living is safe from the excesses of the federal government under the ESA's take provision and implementing regulations like that at issue here.

Finally, an additional reason to address the question presented sooner rather than later is that striking down the take prohibition on Commerce Clause grounds would avoid serious constitutional issues under the takings clause of the Fifth Amendment. Rules requiring that introduced animals be allowed to wander over private property, at will and unmolested, result in no less a physical occupation of the land than the cable box held to be a taking in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). There is no legally relevant difference between a regulation that requires a landowner to permit wolves to "pass to and fro" across its property or establish a home there and a regulation that gives *people* that right, which this Court held to be a taking in *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 832 (1987) (a compensable "permanent physical occupation" occurs when government gives the public a "continuous right to pass to and fro, so that the real property may continuously be traversed"). See, e.g., Harrison, *The Endangered Species Act and Ursine Usurpations: A Grizzly Tale of Two Takings*, 58 U. Chi. L. Rev. 1101, 1114 (1991); *Christy* v. *Lujan*, 490 U.S. 1114, 1115-1116 (1989) (White, J., dissenting from denial of certiorari). The probability that enforcement of the take provision against private landowners acting against listed species located on their private property will result in the United States becoming liable to pay significant compensation provides another reason for this Court to address the constitutionality of the take provision now.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, this Court should grant the petition for writ of certiorari.

Respectfully submitted.

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No. 00-844

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IN THE

Supreme Court of the United States

CHARLES GILBERT GIBBS, *et al*,

Petitioners,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, *et al*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENT DEFENDERS OF WILDLIFE

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QUESTION PRESENTED

Whether the Constitution authorizes the federal government to advance the recovery of the only wild population of endangered red wolves by regulating the "taking" of such wolves.

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INTRODUCTION

The petitioners offer no legitimate reason for this Court to review the Fourth Circuit's decision sustaining a regulation promulgated under the Endangered Species Act ("ESA") as a legitimate exercise of the federal commerce power. The petition cites a need for this Court to reconcile disagreements in the lower courts, despite a uniform body of federal case law that fully accords with the decision below. The petition also calls for this Court to enforce the principles of its recent Commerce Clause jurisprudence, despite the faithful application of those principles by a court that cannot credibly be depicted as hostile to federalism concerns. In fact, no case in any federal court—including this Court's recent decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), No. 99-1178, 2001 WL 15333 (U.S. Jan. 9, 2001)—presents any inconsistency with the holding or reasoning of the Fourth Circuit's decision. The Petition for a Writ of Certiorari should be denied.

CONSTITUTIONAL PROVISIONS, TREATY PROVISIONS, AND REGULATIONS INVOLVED

Constitutional Provisions:

Article I, Section 8 of the United States Constitution provides in Clauses 3 and 18 that:

> The Congress shall have Power ...
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; [and]
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this

> Constitution in the Government of the United States, or in any Department or Officer thereof.

Article II, Section 2, Clause 2 of the United States Constitution provides:

> The President ... shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur ....

The Supremacy Clause, Article VI, Clause 2 of the United States Constitution, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Treaty Provisions:

The 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, United States-Other American Republics, 56 Stat. 1354, T.S. No. 981 (effective May 1, 1942), provides, in pertinent part, as follows:

> The Governments of the American Republics, wishing to protect and preserve in their natural habitat representatives of all species and genera of their native flora and fauna, including migratory birds, in sufficient numbers and over areas extensive enough to assure them from becoming extinct through any agency within man's control; and
>
> * * *
>
> Wishing to conclude a convention on the protection of nature and the preservation of flora and fauna to

effectuate the foregoing purposes have agreed upon the following Articles:

* * *

Article V

1. The Contracting Governments agree to adopt, or to propose such adoption to their respective appropriate law-making bodies, suitable laws and regulations for the protection and preservation of flora and fauna within their national boundaries but not included in the national parks, national reserves, nature monuments, or strict wilderness reserves ....

Regulations:

The Petitioners' Appendix does not correctly reproduce the federal regulation at issue, 50 C.F.R. § 17.84(c). The regulation is correctly reproduced in the Appendix, *infra*, pages 1a-5a.

STATEMENT OF THE CASE

A. The Endangered Species Act

The Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, requires protection of wildlife species determined to be endangered or threatened with extinction. Among the stated purposes of the ESA is "to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b); *see also id.* § 1536(a)(1) (requiring all federal agencies to "carry[] out programs for the conservation of endangered species and threatened species"). To "conserve" a species under the ESA means more than merely preventing its extinction. It means "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [by the ESA] are no longer necessary," *id.* § 1532(3)—*i.e.*, to

recover endangered and threatened species from their imperiled condition.

Among the chief measures set forth in the ESA to achieve this goal is a general prohibition on "taking" any endangered species within the United States. *See id.* § 1538 (a)(1)(B). Under the ESA, to "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19).

In 1982, Congress added a new conservation provision to the ESA. Although the ESA previously had authorized "transplantation" of endangered and threatened species to promote their recovery, *id.* § 1532(3), Congress enacted a new section 10(j) to provide expressly for the release of "experimental populations" of endangered and threatened species into their historic habitats. 16 U.S.C. § 1539(j). Congress crafted section 10(j) "[t]o encourage efforts to establish such experimental populations when the conservation needs of a species would be served by doing so." H.R. Rep. No. 97-567, at 33 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2833.

Section 10(j) provides for flexible tailoring of the ESA's management requirements. Most pertinent to this case, section 10(j) provides discretion for the U.S. Fish and Wildlife Service ("FWS") (which administers the ESA with respect to terrestrial species) to issue "such regulations as [it] deems necessary and advisable to provide for the conservation" of any experimental population. 16 U.S.C. § 1533(d); *see also id.* § 1539(j)(2)(C). Among other things, such regulations may relax the ESA's general taking prohibition by permitting takings in specified circumstances. Congress intended section 10(j) to provide a pragmatic means of accomplishing species reintroductions that might otherwise be "frustrated by public opposition." H.R. Rep. No. 97-567, at 34, *reprinted in* 1982 U.S.C.C.A.N. at 2834. It specifically intended section 10(j)'s flexible measures to

facilitate "the release of experimental populations of predators, such as red wolves." *Id.*

B. The Red Wolf Reintroduction Program

The red wolf once ranged throughout the southeastern United States. Pet. App. 4a. However, the drainage of the vast wetlands that once provided habitat for the wolves, coupled with extensive federal, state, and private predator-control efforts, reduced the species to a small remnant population. *See* Pet. App. 5a. Accordingly, the FWS in 1967 listed the red wolf as an endangered species. *See* 50 C.F.R. § 17.11(h). By the mid-1970s, the remaining red wolves were few in number, in poor physical condition, and threatened by inbreeding. *See* Pet. App. 5a. The FWS elected to capture the last red wolves and place them in a captive breeding program with the expectation of one day reintroducing the species to the wild. *See id.*

The FWS's reintroduction plan came to fruition in 1986 with the release of red wolves into the 120,000-acre Alligator River National Wildlife Refuge in northeast North Carolina. *See id.* In conjunction with the release, the FWS promulgated a rule, 50 C.F.R. § 17.84(c), governing the "taking" of red wolves in the experimental population by members of the public. This "red wolf regulation" prohibits only the intentional or willful killing of a red wolf. *See id.* § 17.84(c)(4)(i). Moreover, it permits private landowners to kill a red wolf if they find it on their property in the act of killing pets or livestock, *see id.* § 17.84(c)(4)(iii), or if agency efforts to recapture the wolf have been abandoned and an appropriate FWS official approves the taking. *See id.* § 17.84(c)(4)(v). The regulation also permits landowners to "harass" red wolves from their property by non-injurious means. *See id.* § 17.84(c)(4)(iv).

The reintroduction quickly proved successful. The wolves reproduced in the wild and grew in number, and the

FWS expanded the program to include the nearby 112,000-acre Pocosin Lakes National Wildlife Refuge. *See* Pet. App. 5a. As of 1998, the FWS reported that 75 red wolves were living in the wild. *See id.* The wolves have occupied both the refuges and surrounding private lands, and the owners of approximately 200,000 acres of private land near the refuges have agreed with the FWS to permit the wolves to range on their property. *See id.*; C.A. App. 342-45.

Contrary to the petitioners' assertions, the reintroduction of red wolves has not generated any "dangerous conflict between wolves and humans." Pet. 4. Although petitioners cite their purported need to "protect[] themselves ... from the depredations of wild wolves," Pet. 2, they have been unable to identify a single incident in which wild wolves (much less wild red wolves) have attacked a person anywhere in the United States. *See* C.A. App. 1396.[1] As for petitioner Mann's assertion that his "small son was threatened by a red wolf," Pet. 4, the record on this point—which consists solely of petitioners' uncorroborated account—establishes merely that a red wolf "approached" Mr. Mann's son while the family was hunting with a rifle, then fled but "paused" to look back before disappearing into the brush. C.A. App. 1395. Nor have the wolves taken a significant toll on private property. To date, confirmed losses have amounted to one dog, some goats, and a rooster over the entire life of the reintroduction program, all of which were fully compensated by the FWS. *See* C.A. App. 372-75.

As the FWS has observed, "the reintroduction experiment was successful and generated benefits that extended beyond the immediate preservation of red wolves to positively affect local citizens and communities, larger conservation efforts, and other imperiled species." 58 Fed.

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[1] Of course, the FWS's regulation would authorize a taking in the unlikely event that a red wolf were to threaten a human being. *See* 50 C.F.R. § 17.84(c)(4)(i), (ii).

Reg. 62,086, 62,087 (1993). The wolves are the subject of wildlife-related study and tourism that has drawn visitors to eastern North Carolina from around the world. *See* Pet. App. 17a-18a; C.A. App. 840, 1261-1301. Further, as the first-ever reintroduction into its former range of a predator species that was officially declared extinct in the wild, the red wolf reintroduction has served to guide later reintroductions of other imperiled wildlife species around the country, including the California condor, black-footed ferret, Mexican wolf, Rocky Mountain wolf, and eastern cougar. *See* C.A. App. 170, 603.

C. The Present Litigation

Petitioners sued the defendants in the Eastern District of North Carolina on March 3, 1997, claiming that the red wolf regulation exceeds the federal government's constitutional powers. *See* Pet. App. 58a-59a. On October 27, 1997, the district court granted a motion by Defenders of Wildlife to intervene as defendants. *See id.* On December 21, 1998, the district court granted the defendants' motions for summary judgment. *See id.* 58a-69a. The court held that the red wolf regulation was within the federal government's authority under the Commerce Clause. *See id.* 64a-69a.

The court of appeals affirmed. *See id.* 1a-55a. Chief Judge Wilkinson's majority opinion concluded that the activities regulated by the red wolf regulation have a "substantial relation to interstate commerce" and constitute "economic activity" within the meaning of this Court's recent Commerce Clause jurisprudence. *See id.* 14a-15a (citing *United States v. Morrison*, 120 S. Ct. 1740 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995)). The majority cited ongoing interstate tourism and scientific research focused upon the red wolf population, the potential for a renewed trade in wolf-related products such as fur pelts, and the economic motivation of petitioners and others to take red wolves for the purpose of protecting agricultural

products and livestock. *See* Pet. App. 17a-23a. The majority concluded that "[t]he protection of the red wolf on both federal and private land substantially affects interstate commerce through tourism, trade, scientific research, and other potential economic activities." *Id.* 26a.

The majority held that the red wolf regulation "is also an integral part of the overall federal scheme to protect, preserve, and rehabilitate endangered species, thereby conserving valuable wildlife resources important to the welfare of our country." *Id.* 14a. The majority recognized this Court's admonition that "'where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under the statute is of no consequence.'" *Id.* 27a-28a (quoting *Lopez*, 514 U.S. at 558). Accordingly, it reasoned that "the effects on interstate commerce should not be viewed from the arguably small commercial effect of one local taking, but rather from the effect that single takings multiplied would have on advancing the extinction of a species." *Id.* 28a. The latter, the majority concluded, "has an effect on many dimensions of commerce between the states." *Id.*

Finally, Chief Judge Wilkinson wrote that upholding the red wolf regulation "is consistent with the 'first principles' of a Constitution that establishes a federal government of enumerated powers." *Id.* 30a (citing *Lopez*, 514 U.S. at 552). The majority reasoned that, "[g]iven the history of federal regulation over wildlife and related environmental concerns, it is hard to imagine how this anti-taking regulation trespasses impermissibly upon traditional state functions—either control over wildlife or local land use." *Id.* 33a. It concluded that "invalidating this regulation would deal a damaging blow to the essential place of the enumerated powers in preserving scarce resources of all sorts for the common good." *Id.* 40a.

Judge Luttig dissented. *See id.* 46a-55a. He asserted that taking of red wolves "has no current economic character" and "no foreseeable economic character at all." *Id.* 53a (Luttig, J., dissenting). He acknowledged, however, that the taking of red wolves is "an activity that Congress could plainly regulate under its spending power and under its power over federal lands, regardless." *Id.*

The court of appeals denied rehearing en banc on August 25, 2000. No member of the court requested a poll on the petition. *See id.* 56a-57a.

REASONS THE PETITION SHOULD BE DENIED

I.

THE FOURTH CIRCUIT'S RULING REVEALS NO NEED FOR GUIDANCE FROM THIS COURT

The petitioners assert that "the lower courts are badly torn on the scope of federal power to regulate noncommercial activities affecting wildlife" and that "this conflict [sic] warrants this Court's immediate attention." Pet. 21. Contrary to the petitioners' assertion, however, Chief Judge Wilkinson's opinion in this case reflects no "conflict" among the lower courts and bears none of the hallmarks of a decision that merits this Court's "immediate attention."

Despite their attempt to conjure up the impression that the lower courts are in disarray, the petitioners are forced to concede that *every* federal court that has addressed the constitutionality of the Endangered Species Act or regulations promulgated under it (or of similar federal legislation such as the Eagle Protection Act) has agreed that the Commerce Clause authorizes such federal protection of wildlife. *See* Pet. 20-21 (citing *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997); *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981);

United States v. Bramble, 103 F.3d 1475 (9th Cir. 1996); *Building Indus. Ass'n of Superior Cal. v. Babbitt*, 979 F. Supp. 893 (D.D.C. 1997), *appeal pending*, No. 00-5143 (D.C. Cir.)). By petitioners' own concession, the most common indicator of a need for intervention by this Court—a division among the Circuits on an important issue of federal law—is completely absent here.

Lacking a conflict among the Circuits on which to hang their petition, the petitioners instead contend that purported disagreements among some federal *judges* warrant review by this Court. The petitioners rely heavily on the differences between the opinions of the two judges in the majority in the D.C. Circuit's ruling in *National Association of Home Builders v. Babbitt*, *supra*, which upheld the constitutionality of protecting an insect called the "Delhi Sands Flower-Loving Fly" under the Endangered Species Act. *See* Pet. 21-22. More important than any theoretical differences between the opinions of Judges Wald and Henderson in that case, however, was their agreement with each other—and with every other extant federal judicial decision—that the Act falls comfortably within the bounds of the Commerce Power.

Moreover, the petition neglects to mention that this Court already had an opportunity to consider whether the slightly differing approaches of Judges Wald and Henderson merited further review when it considered and denied the petition for a writ of certiorari in the *Home Builders* case. *National Ass'n of Home Builders v. Babbitt*, 524 U.S. 937 (1998). Remarkably, the petition for certiorari not only fails to acknowledge that certiorari was denied on this issue in the *Home Builders* case, but even omits "*cert. denied*" in its citation to *Home Builders* both in the text of the petition and in the table of cases. *See* Pet. v, 18-19, 20.

There is even less reason to grant certiorari on the constitutionality of the ESA's protections now than there was in *Home Builders*. Since the Court denied certiorari in

that case, it has provided additional guidance to the lower federal courts on Commerce Clause issues in its decision in *United States v. Morrison*, 120 S. Ct. 1740 (2000), affirming the Fourth Circuit's application of the Commerce Clause to strike down the Violence Against Women Act in *Brzonkala v. Virginia Polytechnic Institute & State University*, 169 F.3d 820 (4th Cir. 1999) (en banc). The court below had the full benefit of this Court's reasoning in *Morrison* (as well as its own reasoning in *Brzonkala*, which this Court largely endorsed), and Chief Judge Wilkinson's opinion adheres conscientiously to the rules laid down in *Morrison* as well as its predecessor, *United States v. Lopez*, 514 U.S. 549 (1995).

Indeed, Chief Judge Wilkinson's legal analysis begins with the statement that "[w]e consider this case under the framework articulated by the Supreme Court in *United States v. Lopez* and *United States v. Morrison*." Pet. App. 9a (citations omitted). The opinion goes on to cite *Morrison* and *Lopez* repeatedly en route to the conclusion that "[u]nlike the statutes in *Lopez* and *Brzonkala* [*Morrison*], [the red wolf regulation] can be upheld while observing principled limitations on federal power." *Id.* at 503.

Chief Judge Wilkinson's opinion represents the first federal judicial application of the principles of *Morrison* to the ESA, and, indeed, the first opinion applying *Morrison* to any federal statutory scheme. The petitioners cite no post-*Morrison* decision of any court that conflicts with the decision below either in its holding or on some pertinent point of principle. Unless and until some actual disagreement develops among the federal courts about the application of *Morrison* to the ESA or some closely analogous federal law, there is no need for this Court to intervene in this area so soon after laying out the governing principles in *Morrison*.

Of course, the only post-*Morrison* "disagreement" the petitioners cite is Judge Luttig's solitary dissent—which did not even persuade a single Fourth Circuit judge to vote to

rehear this case en banc. If, as petitioners suggest, a dissent in a court of appeals decision were enough to establish a "conflict warrant[ing] this Court's immediate attention" (Pet. 21), this Court's docket would require considerable expansion, to say the least.

Judge Luttig's disagreement with Chief Judge Wilkinson's Commerce Clause analysis is a particularly unpersuasive reason for granting certiorari in this case in light of his simultaneous acknowledgment that the federal government "plainly" may regulate the taking of red wolves in the experimental population under Congress' spending power and its power over federal lands. Pet. App. 53a. This concession—which draws support from the fact that the red wolves have been released onto federal lands by a federal agency using funds appropriated by Congress—renders Judge Luttig's disagreement with the majority's analysis a matter of academic interest only.

In any event, the petitioners' adoption of Judge Luttig's claim that Chief Judge Wilkinson and the rest of the Fourth Circuit have now "consigned" *Lopez* and *Morrison* "to aberration" (Pet. 21, quoting Pet. App. 51a (Luttig, J., dissenting)) is not remotely credible. The record of the Fourth Circuit hardly bears out the suggestion of the petitioners and the dissenting judge that the Commerce Clause and other limitations on federal power will henceforth be a dead letter in Virginia, West Virginia, Maryland and the Carolinas.

The Fourth Circuit's opinion in *Brzonkala*, after all, helped pioneer the approach taken by this Court in *Morrison*. Chief Judge Wilkinson joined in the en banc court's decision in *Brzonkala*, and hailed it as the reflection of a "jurisprudence [that] holds the promise to be an enduring and constructive one." *Brzonkala*, 169 F.3d at 893 (Wilkinson,

C.J., concurring).[2] The decision below shows no sign that Chief Judge Wilkinson has retreated from the views he expressed in *Brzonkala*.

Brzonkala, moreover, is only one of a spate of recent cases in which the Fourth Circuit has given expansive scope to federalism concerns and taken a skeptical and narrow approach to the scope of federal regulation. The Fourth Circuit, for example, anticipated almost precisely this Court's recent holding in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 2001 WL 15333, that the Corps of Engineers had overreached its authority to regulate "navigable waters" under the Clean Water Act. *See United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997).

Many other Fourth Circuit decisions similarly reflect what that court has called "the recent intensity with which the Supreme Court *and this circuit* have focused on issues of federalism, separation of powers, and a limited federal government." *Litman v. George Mason University*, 186 F.3d 544, 555 (4th Cir. 1999) (emphasis added), *cert. denied*, 120 S. Ct. 1220 (2000). *See, e.g., Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir.), *petition for cert. filed*, 68 U.S.L.W. 3164 (U.S. Sept. 8, 1999) (No. 99-424); *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), *rev'd*, 528 U.S. 141 (2000); *In re Creative Goldsmiths of Washington, D.C.*, 119 F.3d 1140 (4th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998); *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc); *cf. Brown & Williamson Tobacco*

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[2] Ironically, Judge Luttig's dissent below criticizes Chief Judge Wilkinson's statement in *Brzonkala* that *Lopez* and other recent decisions reflect a new "judicial activism" in support of federalism, without acknowledging that Chief Judge Wilkinson *endorsed* such activism as a reflection of legitimate constitutional principles. *Compare* Pet. App. 53a (Luttig, J., dissenting), *with Brzonkala*, 169 F.3d at 892-98 (Wilkinson, C.J., concurring).

Corp. v. FDA, 153 F.3d 155 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000).

In short, the petitioners' report of the death of federalism in the Fourth Circuit is greatly exaggerated. Unless and until there develops either some genuine uncertainty in the lower courts about the application of this Court's Commerce Clause decisions to the ESA or some real reason to believe that this Court's precedents are not being conscientiously followed, there is no "immediate need" for the Court to address the issues resolved by the Fourth Circuit in this case.

II.

THE COURT'S RECENT DECISION IN *SOLID WASTE AGENCY OF NORTHERN COOK COUNTY v. UNITED STATES ARMY CORPS OF ENGINEERS* PROVIDES NO SUPPORT FOR PETITIONERS' POSITION

Much of the petition for certiorari is devoted to arguing that the Court should hold this case pending its decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), No. 99-1178, and should grant certiorari, vacate, and remand if it were to reach the constitutional issue in that case. Both those requests are now moot: The Court has decided *SWANCC*, so there is no reason to hold this petition; and it has decided *SWANCC* without reaching any constitutional issue, so there is no basis for vacatur and remand.

Indeed, the Court's opinion in *SWANCC* only serves to underscore the irrelevance of that decision to the issues posed by this case. The holding of the Court in *SWANCC* is that the plain language of the Clean Water Act, authorizing the Army Corps of Engineer to regulate discharges of fill material into "navigable waters," does not extend to "nonnavigable, isolated, intrastate waters," and, thus, the Corps' regulation purporting to require permits for discharges into such

isolated, nonnavigable waters "exceeds the authority granted to [the Corps] under § 404(a) of the CWA." 2001 WL 15333, at *6, *9. The purely statutory issue that was actually resolved by the Court in *SWANCC* has no application in this case.

The Court did observe that its holding found support not only in the plain language of the statute but also in the principle of avoiding constructions of statutes and regulations that would raise "significant constitutional questions." *Id.*, 2001 WL 15333, at *8. The Court's invocation of this principle, however, provides no basis either for taking up this case or for returning it to the Fourth Circuit for further consideration, because even before *SWANCC*, the Fourth Circuit had already invoked precisely the same principle of construction to reach exactly the same result under the very same statute and regulation in *United States v. Wilson*, 133 F.3d at 256-57. In other words, the holding in *SWANCC* was already the law in the Fourth Circuit when that court upheld the red wolf regulation in this case, and the Fourth Circuit correctly saw no inconsistency between the two.

Indeed, this Court's discussion of the principle of constitutional avoidance in *SWANCC* only serves to emphasize the significant differences between that case and this one. Central to the Court's reasoning in *SWANCC* was that there it was an *agency*, operating without clear marching orders from Congress, that had "invoke[d] the outer limits of Congress' power." 2001 WL 15333, at *8. The Court emphasized its assumption that "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority," *id.*, and hence the Court applied the rule that "'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" *Id.* (quoting *Edward J. DeBartolo Corp.*

v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

In this case, by contrast, there can be no doubt that Congress has itself authorized the administrative action in question. Although the petitioners characterize this case as an assault on a particular regulation, there is no dispute that the ESA expressly provides for prohibitions on the taking of endangered species such as the red wolf, expressly authorizes the establishment of experimental populations of such species to advance the statutory goal of restoring their numbers in the wild, and expressly provides for modification of the taking prohibition to permit takings of members of such experimental populations that would otherwise be illegal. If such measures approach the limits of the Commerce Power, it is Congress that has made the decision to go that far, not the agency.

Moreover, in upholding the expansive scope of the ESA's taking prohibition, this Court has already validated, as a matter of statutory interpretation, the type of sweeping regulatory construction of the statute that, according to the petitioners, raises a constitutional concern. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). Nowhere in the *Sweet Home* decision—rendered only two months after *Lopez*—is there the slightest suggestion that a broad construction of the ESA's taking prohibition (indeed, a construction that represented a much more aggressive *agency* interpretation than anything at issue in this case) raised any constitutional questions concerning the scope of congressional authority. Read in light of the principles affirmed in *SWANCC*, the holding in *Sweet Home* suggests that the Court saw no significant constitutional question (other than the issues of fair notice discussed in the opinions) implicated by the ESA.

III.

THE FOURTH CIRCUIT'S DECISION IS CORRECT

A. The Commerce Clause Authorizes Regulation To Prevent Destruction Of The Nation's Endangered Wildlife

In any event, the petitioners' criticisms of the merits of the decision below are misplaced. The majority's holding that the red wolf regulation may be sustained under the Commerce Clause reflects a correct application of the principles laid down by this Court in *Morrison* and *Lopez*.

As Chief Judge Wilkinson recognized, "the connection to economic or commercial activity plays a central role in whether a regulation will be upheld under the Commerce Clause"; however, "economic activity must be viewed in broad terms." Pet. App. 12a. Indeed, *Lopez* made clear that "economic activity" within the meaning of the Court's Commerce Clause cases encompasses not only facially commercial activities, but also activities "that arise out of or are connected with a commercial transaction." 514 U.S. at 561; *see also id.* at 573-74 (Kennedy, J., concurring) (recognizing the Court's "practical conception of commercial regulation").

Exploitation or destruction of the nation's valuable natural resources—including by "taking" endangered species—constitutes such economic activity. Destroying natural resources is "connected with" commercial transactions because it extinguishes the potential commercial benefits of such resources. Thus, in *Hodel v. Virginia Surface Mining & Reclamation Association*, the Court affirmed Congress' power to regulate surface coal mining under the Commerce Clause based upon legislative findings that such mining "destroy[s] or diminish[es] the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes." 452 U.S. 264, 277-78

(1981) (quoting 30 U.S.C. § 1201(c)). The companion case of *Hodel v. Indiana* affirmed that Congress may act pursuant to the Commerce power to preserve the nation's prime farmland from destruction. 452 U.S. 314, 324-27 (1981). As Chief Judge Wilkinson's opinion properly recognized, these authorities establish "that protection of natural resources may require action from Congress." Pet. App. 36a.

The Commerce Clause power to preserve natural resources from destruction likewise authorizes the regulation at issue in this case. The ESA recognized and declared that imperiled species of wildlife constitute natural resources "of esthetic, ecological, educational, historical, recreational, and scientific value" to the nation. 16 U.S.C. § 1531(a)(5). Both the purposes and the design of the statute have "an evident commercial nexus." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). Congress intended the ESA to preserve "potential resources" of "incalculable" value. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 178 (1978) (internal quotations and citation omitted). To protect and to restore these resources, Congress prohibited the taking of species deemed to be threatened with extinction and required federal agencies to use "all methods and procedures" to recover them so that both consumptive and non-consumptive commercial activity with respect to such species could be resumed. *See* 16 U.S.C. §§ 1538(a)(1)(B), (C); 1536(a)(1); 1532(3); *see also* Pet. App. 20a-21a.

The majority below properly concluded that the red wolf regulation serves the ESA's commercial purposes by applying the statute's taking prohibition (with numerous exceptions) to protect and to restore the only existing wild population of endangered red wolves. As Chief Judge Wilkinson observed—and as undisputed record evidence demonstrates—North Carolina's red wolves today are the subject of interstate tourism that has drawn many visitors from around the country, and scientific work that has drawn persons from around the world. *See* Pet. App. 16a-20a; C.A.

App. 840, 1261-1301. Chief Judge Wilkinson's analysis of the nexus between this interstate commerce and federal wolf protection measures reflects common sense: "with no red wolves, there will be no red wolf related tourism" and "no scientific research" related to the wolves. Pet. App. 15a-16a.

The petition for certiorari pays scant attention to the record evidence of commercial traffic associated with the wolves. Rather, it selectively condemns Chief Judge Wilkinson's additional observation that recovery of the wolf population could yield renewed commerce in wolf-related products. *See* Pet. 24-26. Yet there is nothing fanciful about the majority's well-documented conclusion that wolves have been, and continue to be, exploited for commercial products where they are sufficiently plentiful to make such traffic practicable. *See* Pet. App. 20a-21a, 40a.

In any event, it required no "exercise in speculation" for Chief Judge Wilkinson to find that the reintroduced red wolves have contributed to an active market in tourism and scientific study in eastern North Carolina. Pet. 25. Indeed, the record of commerce focused upon endangered wildlife is far stronger in this case than it was in the *Home Builders* case, which this Court already has determined did not warrant further review. Contrary to petitioners' argument, the existence of record evidence documenting interstate commerce associated with the very species at issue, in the very location where the challenged federal regulation applies, hardly makes this case "an ideal opportunity" for the Court to chart "the limits of the federal commerce power as regards wild animals." Pet. 24.

B. The ESA Does Not Intrude Into An Area Of Purely Local Concern

The petition ignores history and this Court's own jurisprudence in arguing that "[r]egulation of wild animals, including human interactions with animals on private

property, remains a matter of state concern that is outside the powers conferred on Congress." Pet. 28. Certainly, States play an integral role in regulating wildlife—a role that the ESA respects, *inter alia*, in its criteria for determining whether a species is endangered, *see* 16 U.S.C. § 1533(b)(1)(A) (requiring consideration of "those efforts, if any, being made by any State ... to protect such species"), in its directive that federal agencies administering the ESA "shall cooperate to the maximum extent practicable with the States," *id.* § 1535(a), and in its overriding purpose to recover imperiled wildlife species so that federal protections may be terminated and management of such species may revert to the States. *See id.* §§ 1531(b), 1532(3).

However, it is equally true—as the majority below recognized—that wildlife conservation "is an appropriate and well-recognized area of federal regulation." Pet. App. 34a. "The federal government has been involved in a variety of conservation efforts since the beginning of this century." *Id.* The Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 702-12, the Bald Eagle Protection Act of 1940, 16 U.S.C. §§ 668-668d, and the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1421h, all charted the course for federal conservation of endangered wildlife that led to enactment of the ESA in 1973.

This Court's recognition of the federal role in wildlife conservation began with Justice Holmes' opinion in *Missouri v. Holland*, 252 U.S. 416 (1920), and has never wavered. *See, e.g., Andrus v. Allard*, 444 U.S. 51, 63 n.19 (1979) (recognizing commerce power to protect migratory wildlife); *Douglas v. Seacoast Prods. Inc.*, 431 U.S. 265, 281-82 (1977) (regulation of fishing in state waters); *cf. Hughes v. Oklahoma*, 441 U.S. 322 (1979) (finding intrastate harvest of minnows within reach of dormant Commerce Clause).

The Court only recently reaffirmed the federal role in wildlife conservation. In *Minnesota v. Mille Lacs Band of*

Chippewa Indians, 526 U.S. 172, 204 (1999), the Court rejected an argument that Indian hunting and fishing rights conferred by a federal treaty conflicted irreconcilably with Minnesota's "sovereignty over the natural resources in the State." *Id.* at 204. The Court stated that "[a]lthough States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers." *Id.*

Thus, the red wolf regulation does not "intrude[] into an area of purely local concern," as petitioners contend. Pet. 26. Rather, as Chief Judge Wilkinson correctly concluded, "State control over wildlife ... is circumscribed by federal regulatory power." Pet. App. 31a.

C. The Petition Does Not Present The Narrow Challenge That Petitioners Suggest

The petitioners protest that their case "is not an attack on the entire scheme of federal environmental regulation." Pet. 28. But if, as petitioners suggest, this case really did present only a narrow challenge to a unique regulation governing a mere handful of animals in one small region of a single state, on a subject that Congress could regulate pursuant to its other enumerated powers even if the commerce power were unavailable, one wonders why this Court should bother with it at all.

In fact, however, the petition misstates both the scope and the import of its challenge. Although aimed at a specific regulatory application, this case effectively challenges the ESA's prohibition on "taking" all endangered species. *See* 16 U.S.C. § 1538(a)(1)(B). Indeed, petitioners' challenge necessarily implicates the federal government's general authority to regulate takings of endangered species, for even

if the regulation at issue were invalidated, the taking of red wolves would remain illegal under the ESA.[3]

Of course, virtually any challenge to the application of the ESA to a particular species could be framed as involving only a "handful of animals," often existing in but "one small region of one state." Pet. 28 (quoting Pet. App. 52a (Luttig, J., dissenting)). By definition, endangered species are reduced in number and frequently also in geographic range. *See* 16 U.S.C. §§ 1532(6), 1533(a)(1)(A). Chief Judge Wilkinson aptly noted the perverse result that would flow from petitioners' argument: "the more endangered the species, the less authority Congress has to regulate the taking of it." Pet. App. 28a.

Such a view would have devastating results. If the federal government is without power to preserve the only population of red wolves existing in the wild, then it may be equally powerless to preserve the last population of any species that ventures off the federal lands. Yet the most accurate data available show that more than 90 percent of all species listed for protection under the ESA have some or all of their habitat on nonfederal lands. Pet. App. 38a. Holding the federal government powerless to protect endangered or threatened species on nonfederal lands would leave many species at severe risk of extinction, or else doomed to preservation only as zoo specimens. Chief Judge Wilkinson rightly concluded that nothing in the Constitution requires this result.

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[3] Section 10(j) of the ESA provides that "each member of an experimental population shall be treated as a threatened species." 16 U.S.C. § 1539(j)(2)(C). Absent a special regulation (such as the red wolf regulation) affording diminished protection to a threatened species, the ESA's general taking prohibition applies to members of a threatened species. *See* 50 C.F.R. § 17.31(a); *see also* 16 U.S.C. § 1533(d) ("The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under [the taking prohibition].").

D. In Any Event, The Regulation And The ESA Are Valid Under The Treaty Power

In addition to being fully supported by the Commerce Clause, the red wolf regulation is valid as a necessary and proper measure to carry into effect the federal treaty power. *See* U.S. Const. art. VI, cl. 2; *id.* art. II, § 2, cl. 2. The majority below did not address the treaty power because it deemed the regulation valid under the Commerce Clause. *See* Pet. App. 26a n.4. Nevertheless, the treaty power provides an alternative constitutional basis for the regulation.

This Court has recognized the treaty power as a basis for federal wildlife regulation on private lands since *Missouri v. Holland*, *supra*, where it sustained the Migratory Bird Treaty Act against a challenge virtually identical to that raised by the petitioners here. Writing for the Court, Justice Holmes stated, "[i]t is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with, but that a treaty followed by such an act could." 252 U.S. at 433.

As with the Migratory Bird Treaty Act, the ESA implements international treaty obligations. Congress in the ESA found that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to" a number of listed treaties, 16 U.S.C. § 1531(a)(4), and enacted the ESA "to achieve the purposes" of those treaties. *Id.* § 1531(b). The most important of the listed treaties for this case is the 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, United States-Other American Republics, 56 Stat. 1354, T.S. No. 981 (effective May 1, 1942). *See* 16 U.S.C. § 1531(a)(4)(C). The Convention promises protection of "all species and genera of ... native flora and fauna ... in sufficient numbers and over areas extensive enough to assure them from becoming

extinct through any agency within man's control." 56 Stat. at 1356. It also commits the contracting governments "to adopt, or to propose such adoption to their respective appropriate lawmaking bodies, suitable laws and regulations for the protection and preservation of flora and fauna within their national boundaries, but not included in the national parks, national reserves, nature monuments, or strict wilderness reserves." *Id.* at 1362; *see Palila*, *supra*, 471 F. Supp. at 993 (relying on the Convention to support the ESA's prohibition on taking of Hawaiian bird species).

Promulgated under the authority of the ESA, the red wolf regulation constitutes a measure "for the protection and preservation of ... fauna within" the United States, "but not included in" any national wildlife reserve, within the meaning of the Convention. As Justice Holmes wrote in *Holland*, where such a valid treaty exists, "there can be no dispute about the validity of the statute under article I, Section 8, as a necessary and proper means to execute the powers of the government." 252 U.S. at 432. Accordingly, the red wolf regulation is constitutionally valid for this reason as well.

CONCLUSION

The petitioners present no legitimate reason for this Court to review the decision of the Fourth Circuit. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

50 C.F.R. § 17.84 Special rules—vertebrates

* * *

(c) Red wolf (Canis rufus).

(1) The red wolf populations identified in paragraphs (c)(9)(i) and (c)(9)(ii) of this section are nonessential experimental populations.

(2) No person may take this species, except as provided in paragraphs (c)(3) through (5) and (10) of this section.

(3) Any person with a valid permit issued by the Service under § 17.32 may take red wolves for educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Act and in accordance with applicable State fish and wildlife conservation laws and regulations;

(4)(i) Any person may take red wolves found on private land in the areas defined in paragraphs (c)(9)(i) and (ii) of this section, Provided that such taking is not intentional or willful, or is in defense of that person's own life or the lives of others; and that such taking is reported within 24 hours to the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer for investigation.

(ii) Any person may take red wolves found on lands owned or managed by Federal, State, or local government agencies in the areas defined in paragraphs (c)(9)(i) and (ii) of this section, Provided that such taking is incidental to

lawful activities, is unavoidable, unintentional, and not exhibiting a lack of reasonable due care, or is in defense of that person's own life or the lives of others, and that such taking is reported within 24 hours to the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer for investigation.

(iii) Any private landowner, or any other individual having his or her permission, may take red wolves found on his or her property in the areas defined in paragraphs (c)(9)(i) and (ii) of this section when the wolves are in the act of killing livestock or pets, Provided that freshly wounded or killed livestock or pets are evident and that all such taking shall be reported within 24 hours to the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer for investigation.

(iv) Any private landowner, or any other individual having his or her permission, may harass red wolves found on his or her property in the areas defined in paragraphs (c)(9)(i) and (ii) of this section, Provided that all such harassment is by methods that are not lethal or physically injurious to the red wolf and is reported within 24 hours to the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer, as noted in paragraph (c)(6) of this section for investigation.

(v) Any private landowner may take red wolves found on his or her property in the areas defined in paragraphs (c)(9)(i) and (ii) of this section after efforts by project personnel to capture such animals have been abandoned,

Provided that the Service project leader or biologist has approved such actions in writing and all such taking shall be reported within 24 hours to the Service project leader or biologist, the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer for investigation.

(vi) The provisions of paragraphs (4)(i) through (v) of this section apply to red wolves found in areas outside the areas defined in paragraphs (c)(9)(i) and (ii) of this section, with the exception that reporting of taking or harassment to the refuge manager, Park superintendent, or State wildlife enforcement officer, while encouraged, is not required.

(5) Any employee or agent of the Service or State conservation agency who is designated for such purposes, when acting in the course of official duties, may take a red wolf if such action is necessary to:

(i) Aid a sick, injured, or orphaned specimen;

(ii) Dispose of a dead specimen, or salvage a dead specimen which may be useful for scientific study;

(iii) Take an animal that constitutes a demonstrable but non-immediate threat to human safety, or which is responsible for depredations to lawfully present domestic animals or other personal property, if it has not been possible to otherwise eliminate such depredation or loss of personal property, Provided That such taking must be done in a humane manner, and may involve killing or injuring the animal only if it has not been possible to eliminate such threat by live capturing and releasing the specimen unharmed on the refuge or Park;

(iv) Move an animal for genetic purposes.

(6) Any taking pursuant to paragraphs (c)(3) through (5) of this section must be immediately reported to either the Refuge Manager, Alligator River National Wildlife Refuge, Manteo, North Carolina, telephone 919/473-1131, or the Superintendent, Great Smoky Mountains National Park, Gatlinburg, Tennessee, telephone 615/436-1294. Either of these persons will determine disposition of any live or dead specimens.

(7) No person shall possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever, any such species taken in violation of these regulations or in violation of applicable State fish and wildlife laws or regulations or the Endangered Species Act.

(8) It is unlawful for any person to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in paragraphs (c)(2) through (7) of this section.

(9)(i) The Alligator River reintroduction site is within the historic range of the species in North Carolina, in Dare, Hyde, Tyrrell, and Washington Counties; because of its proximity and potential conservation value, Beaufort County is also included in the experimental population designation.

(ii) The red wolf also historically occurred on lands that now comprise the Great Smoky Mountains National Park. The Park encompasses properties within Haywood and Swain Counties in North Carolina, and Blount, Cocke, and Sevier Counties in Tennessee. Graham, Jackson, and Madison Counties in North Carolina, and Monroe County in Tennessee, are also included in the experimental designation because of the close proximity of these counties to the Park boundary.

(iii) Except for the three island propagation projects and these small reintroduced populations, the red wolf is extirpated from the wild. Therefore, there are no other extant populations with which the refuge or Park experimental populations could come into contact.

(10) The reintroduced populations will be monitored closely for the duration of the project, generally using radio telemetry as appropriate. All animals released or captured will be vaccinated against diseases prevalent in canids prior to release. Any animal that is determined to be in need of special care or that moves onto lands where the landowner requests their removal will be recaptured, if possible, by Service and/or Park Service and/or designated State wildlife agency personnel and will be given appropriate care. Such animals will be released back into the wild as soon as possible, unless physical or behavioral problems make it necessary to return the animals to a captive-breeding facility.

(11) The status of the Alligator River National Wildlife Refuge project will be reevaluated by October 1, 1992, to determine future management status and needs. This review will take into account the reproductive success of the mated pairs, movement patterns of individual animals, food habits, and overall health of the population. The duration of the first phase of the Park project is estimated to be 10 to 12 months. After that period, an assessment of the reintroduction potential of the Park for red wolves will be made. If a second phase of reintroduction is attempted, the duration of that phase will be better defined during the assessment. However, it is presently thought that a second phase would last for 3 years, after which time the red wolf would be treated as a resident species within the Park. Throughout these periods, the experimental and nonessential designation of the animals will remain in effect.

Supreme Court, U.S.
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No. 00-0844

In the

Supreme Court of the United States

CHARLES GILBERT GIBBS, et al.,

Petitioners,

v.

BRUCE BABBITT, Secretary of the Interior, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL WILDERNESS INSTITUTE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Commerce Clause authorizes federal restrictions on the ability of individuals to defend themselves and their property from wild wolves, when such actions are wholly intrastate and noncommercial.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation and National Wilderness Institute respectfully submit this brief amicus curiae in support of the Petition for a Writ of Certiorari.[1] Written consent for amicus participation in this case was granted by counsel of record for all parties.

Amicus Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF has participated in numerous cases concerning the interpretation of the Commerce Clause and of the Endangered Species Act. PLF believes its public policy perspective and litigation experience will provide an additional viewpoint on the constitutional and legal issues presented.

Amicus National Wilderness Institute (NWI) is a nationwide nonprofit conservation organization with offices in Washington, D.C. NWI is dedicated to the wise management of natural resources. NWI believes conserving natural resources, including species, can be accomplished in conjunction with economic growth, and can best be achieved through private stewardship and private conservation efforts.

NWI has produced numerous publications on the failure of government-sponsored environmental regulatory schemes.

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae Pacific Legal Foundation and National Wilderness Institute affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

In particular, NWI has written extensively on the failure of the Endangered Species Act to meet its species recovery goals despite significant outlays of federal funds, and at the cost of imposing severe curtailments on the freedom of United States citizens to reasonably use private property.

BACKGROUND AND STATEMENT OF FACTS

In 1967, the United States Fish and Wildlife Service designated the red wolf an endangered species. *Gibbs v. Babbitt*, 31 F. Supp. 2d 531, 532 n.1 (E.D.N.C. 1998). After the passage of the Endangered Species Act in 1973, Fish and Wildlife engaged in a program to capture the last remaining red wolves then existing in the wild. *Id.* Since then, red wolves have been propagated exclusively through a captive breeding program. *Id.* In the 1980's, Fish and Wildlife began to seek opportunities to "reintroduce" the red wolf to its historic range. *Id.* Accordingly, in 1986, Fish and Wildlife established a reintroduction program to Alligator National Wildlife Refuge in North Carolina. *Id.* at 532. In 1993, Fish and Wildlife expanded the reintroduction area to include Pocosin Lakes National Wildlife Refuge. *Id.* at 533.

The red wolves in North Carolina are part of a "nonessential experimental" population. *See* 60 Fed. Reg. 18,939, 18,940 (Apr. 13, 1995); 16 U.S.C. § 1539(j). Nonessential experimental populations are generally treated as "threatened." *See* 16 U.S.C. § 1539(j)(2)(C). Under the Act, the regulation of "threatened" species is largely left to the discretion of Fish and Wildlife. *See* 16 U.S.C. § 1533(d).

As the population of red wolves grew, they increasingly wandered onto private land. *Gibbs*, 31 F. Supp. 2d at 533; *see also* 60 Fed. Reg. at 18,941. This situation generated a swell of public opposition. *Gibbs*, 31 F. Supp. 2d at 533. Fish and Wildlife acknowledges that wolves may kill domestic livestock and established "a $25,000 depredation account" to compensate ranchers in the event of loss. 60 Fed. Reg. at 18,942. Fish and

Wildlife also acknowledges that wolves present a threat to humans. It removed one red wolf from Alligator National Wildlife Refuge because it "repeatedly tolerated people at close distances." *Id.* And, in terminating its reintroduction program in Smoky Mountains National Park, it noted that a wolf that had begun to tolerate humans "represents a demonstrable but non-immediate threat to human safety . . . ." 63 Fed. Reg. 54,151, 54,152 (Oct. 8, 1998).

Yet despite the threat, Fish and Wildlife regulations have barred private property owners from "taking" a red wolf on their property except under specified circumstances. Petitioner Richard Lee Mann was prosecuted for violating Fish and Wildlife's regulation when he shot a red wolf that appeared to be threatening his cattle. *Gibbs v. Babbitt*, 214 F.3d 483, 489 (4th Cir. 2000). Partly due to this episode, North Carolina passed a law allowing a private landowner to "take" a red wolf where such a landowner "reasonably believes" that a red wolf may be a threat to his own life, the life of another, or to livestock. *Gibbs*, 31 F. Supp. 2d at 533. Fish and Wildlife's regulations state that a person may "take" a red wolf to defend his own life or the life of another, but a landowner may "take" a red wolf that attacks pets or livestock only where freshly killed or wounded animals are evident. *See id.* at 533 n.4.

Petitioners brought this case challenging the authority of the federal government to promulgate its regulation governing the "take" of red wolves on private property pursuant to its power "[t]o regulate commerce . . . among the several States." *Gibbs,* 31 F. Supp. 2d at 534. The district court upheld the regulation. *Id.* at 535. On appeal, in a 2-1 decision, the Fourth Circuit affirmed. *Gibbs v. Babbitt*, 214 F.3d at 489.

The Petition for a Writ of Certiorari asked this Court to grant the writ and hold the case for remand in light of the then-pending decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, which also

raised questions dealing with the federal commerce power. *See* Petition for a Writ of Certiorari (Petition) at 7. However, on January 9, 2001, this Court issued its decision in that case. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, No. 99-1178, 2001 U.S. LEXIS 640 (Jan. 9, 2001). That case did not resolve the question presented here because it was decided on statutory grounds. Accordingly, Amici urge this Court to grant the Petitioners' alternate request to grant the Writ of Certiorari to decide this case on the merits. *See* Petition at 30.

SUMMARY OF ARGUMENT

At issue in this case is a single regulation passed by Fish and Wildlife that prescribes the conditions under which private citizens within the State of North Carolina may shoot red wolves that come onto their private property. Under the regulation, Fish and Wildlife has made it a federal crime for any individual to shoot a red wolf on his property except under very specific conditions. One of the Plaintiffs here, Richard Mann, was prosecuted under this federal regulation, was fined, and was given the Orwellian sentence of building wolf houses and feeding wolves. *Gibbs*, 31 F. Supp. 2d at 533.

Notwithstanding this Court's pronouncements in *Lopez* and *Morrison* that, in order to meet the "substantial effects" test of constitutionality, a regulation must regulate an economic endeavor, the court below held that a federal regulation governing the killing of red wolves on private property constituted a valid exercise of the constitutional power "to regulate commerce . . . among the several states" not because the conduct itself was economic, but because it might have economic ramifications. This is a flawed interpretation and application of *Morrison* that threatens to eviscerate the "substantial effects" test completely, and this Court should grant the Petition to halt further distortions of this Court's precedents.

Though this Court has provided guidance to the lower courts on how to apply the "substantial effects" test, the court below gave undue deference to Congress and to Fish and Wildlife by sanctioning their pursuit of a socially favored policy. Despite this Court's admonitions in *Lopez* and *Morrison*, the lower court adopted a method of reasoning that entailed willingly fabricating links to interstate commerce that are highly speculative and highly attenuated in order to sustain a noncommercial federal goal. Unfortunately, this tendency to justify federal legislation by exalting narrow social policy goals over the broader interests of constitutional principles remains the norm in how the lower courts have treated Commerce Clause challenges to Endangered Species Act regulations.

Consequently, despite *Lopez* and *Morrison*, a comprehensive test for measuring the legitimacy of congressional enactments against the constitutional power remains elusive, and the lower courts are in need of further guidance. This Court should grant the Petition to clarify not only the scope of the federal power to regulate wildlife, but to refute the tendency of the lower courts to justify Commerce Clause legislation to serve expedient ends in direct contravention of the "substantial effects" standard.

ARGUMENT

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI BECAUSE THE LOWER COURT'S DECISION IN THIS CASE, AND SIMILAR DECISIONS OF OTHER LOWER COURTS, CANNOT BE RECONCILED WITH THIS COURT'S HOLDINGS IN *LOPEZ* OR *MORRISON*

In 1995, this Court decided the landmark case, *United States v. Lopez*, which held that the Gun Free School Zones Act was an invalid exercise of Congress' authority under Article I, Section 8, Clause 3 "[t]o regulate commerce . . . among the several states." Yet despite the watershed implications of that

decision, the lower federal courts continued to apply to federal legislation an expansive view of the federal commerce power. It was not until the Fourth Circuit ruled in *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820 (4th Cir. 1999), that any federal court of appeals adhered to the spirit and letter of *Lopez* by striking the federal Violence Against Women Act (VAWA) as beyond Congress' Commerce Clause authority. VAWA created a federal civil cause of action against any individual who perpetrated a "crime of violence" "motivated by gender." *United States v. Morrison*, 120 S. Ct. 1740, 1747 (2000).

Significantly, despite the logical conclusion that the regulation of crimes of violence is not a regulation of interstate commerce, the public and political reaction to the Fourth Circuit's decision was immediate and strong. Numerous organizations filed briefs asking this Court to review the decision, and, when this Court granted certiorari, 36 states and over 80 private organizations asked this Court for reversal. In particular, a significant number of women's organizations supported VAWA for obvious, and even sound, policy reasons. Nevertheless, this Court upheld the Fourth Circuit's decision by adhering to *legal* precepts rather than policy predilections. In short, unwilling to abandon the "first principle" that the Constitution created a federal government of limited and enumerated powers, *see United States v. Lopez*, 514 U.S. 549, 552 (1995), this Court refused to sanction a federal statute enacted under the commerce power where the statute's purported connections to interstate commerce were so clearly attenuated.

At issue here is a federal regulation which makes it a crime for an individual to kill, or "take," a red wolf, an animal listed as endangered under the Endangered Species Act. *See* 50 C.F.R. § 17.84(c) (2001). Like VAWA's civil cause of action provision, the Fish and Wildlife regulation enacts a broad prohibition on human conduct: an individual may not kill a red

wolf on his property unless human harm is imminent or death to animals is evident. In averring that the wolf regulation meets muster under the commerce power, the federal government and the court below necessarily take the position that, while violence against women may not be regulated by the federal government, violence against wolves may. In sum, the upholding of this regulation must be premised on the concept that a rancher or homeowner killing a red wolf on his own property has a greater effect on interstate commerce than committing violent crimes against humans. This is unsupportable.

The lower court's decision is irreconcilable with this Court's recent Commerce Clause jurisprudence. Specifically, in *Morrison*, this Court reiterated its holding in *Lopez* that, despite the breadth of the commerce power, "Congress' regulatory authority is not without effective bounds." *Morrison*, 120 S. Ct. at 1748. Adhering to the analysis announced in *Lopez*, this Court analyzed the challenged VAWA statute against several factors. First, this Court reiterated that commerce regulations must fall into one of three categories. *Id.* at 1749. First, Congress may regulate "channels of interstate commerce." *Id.* Second, Congress may regulate "instrumentalities of interstate commerce," or "things in interstate commerce." *Id.* And finally, Congress may regulate "those activities that substantially affect interstate commerce." *Id.* This Court found that the only possible category that could serve as the basis for the challenged VAWA provision was the last category, the "substantially affects" category. *Id.* Similarly, in this case, the court below found that "if [the wolf regulation] is within the commerce power, it must be sustained under the third prong of *Lopez*." *Gibbs*, 214 F.3d at 491.

Morrison spells out the requisite analysis for evaluating commerce legislation under *Lopez*' "substantially affects" test. First, this Court explained the importance of the nature of the

activity being regulated; that is, the activity had to be economic in nature:

> *Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, *the activity in question has been some sort of economic endeavor.*

Morrison, 120 S. Ct. at 1750 (emphasis added). Second, this Court looked at whether the statute has an express "jurisdictional element," by which the statute's application would be limited to those cases in which an interstate commerce effect was demonstrated. *Id.* at 1750-51. Third, the Court inquired as to whether Congress had made express findings as to the interstate commerce impacts of the regulated conduct. *Id.* at 1751. And finally, this Court independently analyzed the degree of attenuation between the regulated conduct and the purported effects on interstate commerce. *Id.* In this last factor, this Court reiterated its position that the "method of reasoning" used to justify a commerce regulation must not be so broad that it would "completely obliterate the Constitution's distinction between national and local authority." *Id.* at 1752. In short, this Court rejected any rationale which, if applied logically, would admit of no boundary to the federal commerce power.

Thus, the *Lopez/Morrison* "substantial effects" analysis is relatively straightforward: (1) is the nature of the conduct being regulated commercial or economic; (2) does the statute have an express jurisdictional element that limits its application to those circumstances in which there are interstate commerce impacts; (3) are there express congressional findings that the regulated conduct substantially affects interstate commerce; and (4) is the nexus between the regulated conduct and effects on commerce so attenuated that the rationale linking the two would justify a

limitless commerce power? As explained below, the conduct at issue in this case—killing a wolf on one's own property—is manifestly deficient in satisfying this test.

A. By Upholding the Red Wolf "Take" Regulation As Valid Under the Commerce Clause, the Court Below Established a Circuit Precedent Squarely at Odds with Recent Rulings of this Court

Addressing the four *Lopez/Morrison* factors in turn, it is clear that, like the gun possession statute in *Lopez*, the regulation governing the killing of wolves is "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561. Nonetheless, the court below forcibly shoehorned the wolf regulation into an "economic activity" by rationalizing that "economic activity must be understood in broad terms," citing *Wickard v. Filburn*, 317 U.S. 111 (1942). *Gibbs*, 214 F.3d at 491. Accordingly, the court asserted, with scant evidence, that "taking" wolves is an "economic activity" within the meaning of *Lopez* and *Morrison*:

> The protection of commercial and economic assets is a primary reason for taking the wolves. Farmers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops.

Id. at 492. In other words, the Court did not find that the regulated activity was commercial or economic; rather, it found that the individuals who engage in the conduct *may have* economic motivations and the conduct may have economic ramifications. But this is a boundless standard. The lower court's pronouncement of the facile truism that "with no red wolves, there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts," *id.*, is the same as saying that without food, there would be no food-related events, restaurants, or commerce, *and therefore* the federal government

may regulate how, when, where, whether, and what everybody may eat under its interstate commerce power. The fact that some object may in some circumstances be connected to interstate commerce is a meaningless test for determining what constitutes an "economic activity."

Even accepting the lower court's unsubstantiated assertion that economic motivation or result is the *sine qua non* of red wolf "takes" on private land, the concept that the economic motivation of an actor may convert regulated noncommercial activity into an "economic endeavor" is nowhere supported by *Lopez*, *Morrison*, or any other decision of this Court, and the lower court cites none. Virtually any activity might be shown to have economic ramifications: *"taking"* red wolves has economic ramifications, as does *not "taking"* red wolves, as does *moving* red wolves, as does *feeding* red wolves, as does *taking pictures* of red wolves. Accordingly, under the lower court's test, the government may demand any measure it wants, since any regulation dealing with red wolves is bound to have equally legitimate economic "connections" to red wolves.

Yet had this Court been willing to understand "economic activity" in such "broad terms," both *Lopez* and *Morrison* would present troublesome conundrums. Alphonso Lopez—whose possession of a firearm was for the purpose of ultimately selling the weapon—should have been unsuccessful in challenging the Gun Free School Zones Act. Further, crimes of violence that have an economic motivation—such as robbery—would have been sufficient to sustain VAWA in the face of a facial challenge. Yet this Court did not even discuss such scenarios as relevant to the "economic endeavor" inquiry. In short, there is no support in logic or case law for the proposition that an activity that by itself bears no economic or commercial character can be styled "economic conduct" simply by virtue of the fact that the act may have economic ramifications. *Morrison* baldly rejected the idea that the potential economic consequences of an act were sufficient to

transform noneconomic conduct into an economic activity within the meaning of *Lopez* when it rejected the notion that the economic impacts of violent crime on interstate travel, medical costs, and national productivity were sufficient to sustain VAWA. *Morrison*, 120 S. Ct. at 1753.

Similarly, the red wolf "take" regulation fails to satisfy the other factors of the *Lopez/Morrison* test. There is no jurisdictional element within the regulation. Further, there are no congressional findings to support the regulation, let alone the ESA, as a regulation directed at commerce, which the court below acknowledged: "there are no formal congressional findings that the ESA affects interstate commerce." *Gibbs*, 214 F.3d at 493 n.3. Not deterred, the court below, citing *Lopez* and *Morrison*, noted that such findings would be "neither necessary nor sufficient" to sustain federal regulations. *Gibbs*, 214 F.3d at 493 n.3. Therefore, the *lack* of findings left the court free to validate the statute by crafting its own ideas of how the regulation might affect interstate commerce, unshackled by congressional intent.

As a result, the court below makes a variety of findings supporting its conclusion that the red wolf regulation is "closely connected to a variety of interstate economic activities"—again, a meaningless standard that nowhere appears in this Court's jurisprudence. Specifically, the court found that the "take" "regulation is necessary to conserve enough red wolves to sustain tourism;" *id.* at 494; that "[t]he regulation of red wolf takings is also closely related to a second interstate market—scientific research" and that such research "generates jobs" and "may have inestimable future value, both for scientific knowledge as well as for commercial development of the red wolf;" *id.*, that the regulation is "connected to a third market—the possibility of a renewed trade in fur pelts;" *id.* at 495; and that the protection of red wolves is also "connected to interstate markets for agricultural products and livestock," *id.* In light of *Morrison*'s condemnation of "methods of reasoning"

which, when applied in a logical manner, would allow Congress to regulate anything at all, *Morrison*, 120 S. Ct. at 1752, this analysis is remarkable. Despite the court's assertion that "[t]he relationship between red wolf takings and interstate commerce is quite direct," it starts with a regulation that bans landowners from killing wolves on their own land, and, through extrapolating all the possible ramifications of such an action, concludes that the regulation is in reality a regulation of interstate commerce in tourism, scientific research, fur pelts, and agricultural commodities.

Further, according to the court below, the regulation need not even have an effect on this commerce to be valid:

> The full payoff of conservation in the form of tourism, research, and trade may not be foreseeable. Yet it is reasonable for Congress to decide that conservation of species will one day produce a substantial commercial benefit to this country and that failure to preserve a species will result in permanent, though unascertainable, commercial loss.

Gibbs, 214 F.3d at 496. Thus, this post-*Morrison* analysis holds that any future potential to engage in commerce related to the regulated activity is sufficient to sustain federal authority.

In *Morrison*, the government cited congressional findings that violence against women affected interstate commerce

> "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products."

Morrison, 120 S. Ct. at 1752 (citation omitted). This Court found that these effects were too far removed from the actual

regulated conduct (violence against women) to sustain VAWA. Nonetheless, the court below had little difficulty in approving a rationale that was expressly rejected by this Court in *Morrison*. It is difficult to comprehend how Congress *may not* regulate violent conduct that inhibits the victim from engaging in interstate commerce, but *may* regulate violent conduct that inhibits *others* from engaging in activities *that have the potential to affect* interstate commerce.

The lower court's extended discussion never adequately confronts the fourth *Morrison* factor—whether the rationale is so broad that it sanctions an unlimited federal authority. Instead, it skirts this troublesome factor by concluding that, whatever its rationales may justify, there is no constitutional problem because the Endangered Species Act does not *in fact* attempt to regulate all conduct:

> But these concerns are simply not implicated by [the regulation]. Rather, the ESA and this regulation in particular permit the exercise of federal power only to conserve those species that are "endangered" or "threatened." . . . The rationale for upholding [it] is restricted to the special relationship between endangered species and interstate commerce . . . . It is not a connection that can be drawn outside of the endangered species context to support federal regulation of just any local or intrastate object with a medical, scientific, or economic value.

Gibbs, 214 F.3d at 503-04. In other words, the court excused the fact that its own rationales were boundless, because it asserts that it would *not* have applied the same broad rationales had Congress attempted to regulate everything. But this is analytically incorrect. As this Court explained in *Morrison*, Congress may not regulate a subset of conduct without the authority to regulate the conduct in the first place:

> If Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Morrison, 120 S. Ct. at 1753. The lower court failed to explain how its *reasoning* provided any limiting principle. Indeed, the rationales relied upon by the court below would sanction federal regulation of the treatment of any animal, such as a common house cat, since cats, cat toys, cat food, cat shows, etc., have a tremendous effect on interstate commerce—likely more than the commerce related to all endangered and threatened species, let alone the red wolf. Thus, the lower court's assurances that its rationale is sound rings hollow.

The *Gibbs* decision has essentially relegated this Court's recent precedent in *Morrison* as a case to be treated not as a pronouncement of constitutional principle, but an aberration limited to its own facts. Accordingly, this Court should act swiftly to prevent a further erosion of its pronouncements on the constitutional principle of enumerated powers.

B. Federal Courts Have Been Incapable of Providing Coherent, Cohesive, or Consistent Theories for Upholding the Federal Regulation of Wildlife on Interstate Commerce Grounds, Demonstrating the Need for a Definitive Ruling by this Court

As troubling as the lower court's decision is, it is not the only indicator of the treatment *Lopez* and *Morrison* have received at the hands of the lower federal courts. Limiting this discussion to the sole issue of how the Commerce Clause has been treated with respect to the regulation of wildlife, it is clear that the lower courts have tortured and contorted the Commerce Clause to reach the desired result of upholding the ESA's "take" regulations. While this characterization would appear to

be overly critical, the sheer number and variety of routes which federal judges have traveled to arrive at the improbable conclusion that regulating the "take" of a fly, wolf, bird, or fish is in actuality regulation of interstate commerce is ample evidence of the dubiousness of these commerce rationales. Indeed, the questionable worth of these rationales has prompted Fish and Wildlife to assert alternative sources of federal authority for its regulations, including the Treaty Power (*see Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985, 993 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981); *Shields v. Babbitt*, No. MO-99-CA-040, slip op. at 33 (W.D. Tex. July 12, 2000), *appeal pending*, No. 00-50839; and the Property Clause—even where species do not exist solely on federal property, *see* 65 Fed. Reg. 17,779, 17,781 (Apr. 5, 2000).

The commerce rationales employed by the lower courts to sustain the breathtaking sweep of the Endangered Species Act's "take" regulations are so broad that they violate the fourth *Lopez/Morrison* factor in that, if validated, they would sanction a limitless federal power to regulate anyone and anything. Accordingly, these decisions are not only incorrect as a matter of law, but they have created precedents that necessarily undermine this Court's attempts to establish constitutional norms in *Lopez* and *Morrison*.

The first case to confront a Commerce Clause challenge to regulation under the Endangered Species Act was *Palila*. *Palila*, 471 F. Supp. at 993. The challenge was not to the "take" provision specifically, but to the regulation of Palila birds by the federal government in general, and was couched as a Tenth Amendment challenge. *Id.* As the case was decided prior to this Court's decision in *Lopez*, the lower court's treatment of the Commerce Clause issue is understandably cursory, simply asserting, without further analysis, that

> a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species, that would otherwise be lost by state inaction.

Id. at 995.

The district court's decision in *Palila* was the only case dealing with this issue for over a decade. Subsequent to *Lopez*, however, the Commerce Clause argument was revived in a case challenging federal regulation of the habitat of the Delhi Sands Flower-loving fly. *National Association of Home Builders v. Babbitt*, 949 F. Supp. 1 (D.D.C. 1996), *aff'd*, 130 F.3d 1041 (D.C. Cir. 1997) (*NAHB*). Notably, the district court found that the regulation of the fly was valid under the second and third *Lopez* categories. That is, the fly is a "thing in interstate commerce" because it had been exhibited in three museums outside of its native California and specimens had once been shipped to insect collectors. *NAHB*, 949 F. Supp. at 8. Further, citing *Wickard* and *Palila*, the district court concluded taking flies substantially affected interstate commerce:

> The aggregate impact upon interstate commerce of trade in wildlife is substantial and as such, it may be regulated by Congress. . . . The "taking" of individual species located entirely within one state, would clearly, in the aggregate, have a significant effect upon interstate commerce.

NAHB, 949 F. Supp. at 8 (citations and footnotes omitted).

The court of appeals affirmed in a split decision. Two of the judges upheld the lower court's result, but *neither* upheld the lower court on the same rationale, and a third judge would

have held the regulation invalid. Indeed, the judges did not even agree as to what *Lopez category* the regulation fit into. Judge Wald held the regulation valid under the first and third *Lopez* categories (that is, regulating the channels of interstate commerce and activities that substantially affect interstate commerce), *NAHB*, 130 F.3d at 1046, and Judge Henderson found that only the third *Lopez* category applied, *NAHB*, 130 F.3d at 1057-58. Significantly, *none* of the appeals judges affirmed the lower court's reliance upon the second *Lopez* category (whether the fly was a "thing in interstate commerce"). And even more, though both Judges Wald and Henderson agreed that regulation of the fly substantially affected interstate commerce, they could not agree as to how this was so. Judge Wald relied upon the sorts of broad rationales favored by the *Gibbs* majority, claiming, for example:

> Each time a species becomes extinct, the pool of wild species diminishes. This, in turn, has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes.

NAHB, 130 F.3d at 1053. Judge Henderson, on the other hand, flatly rejected the notion that there is potential future commercial use of the species, concluding that it was just as likely that none of the species protected "now or in the future will have any of the economic value proposed." *Id.* at 1058 (Henderson, J., concurring). She, instead, concluded that

> [g]iven the interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of [the fly] will therefore substantially affect land and objects that are involved in interstate commerce.

Id. at 1059 (Henderson, J., concurring). Judge Sentelle, of course, rejected these and every other rationale. *See id.* at 1060 (Sentelle, J., dissenting).

The decision in *Gibbs* below was also not without conflict. The district court decision, like the district court in *NAHB*, upheld the red wolf regulation under the second and third *Lopez* categories. *Gibbs*, 31 F. Supp. 2d at 535. Astonishingly, the court found that the wolves were things in interstate commerce because some red wolves "either have crossed state lines or may cross state lines in the future"—though why the self-generated movement of wolves across state lines amounted to "commerce" was never explained. Rather, the court simply held that actions by wolves and tourists have "economic consequences, as tourists, academics, and scientists follow the red wolves." *Id.*

With the embellishments noted in Section A above, the Fourth Circuit, in a 2-1 decision, upheld the lower court. But even there, the Fourth Circuit did not entertain for a moment the lower court's assertion that wolves themselves were "things in interstate commerce," *Gibbs*, 214 F.3d. at 491, and Judge Luttig, like Judge Sentelle in the D.C. Circuit, found that the red wolf regulations did not meet this Court's substantial effects test at all, *Gibbs*, 214 F.3d at 506 (Luttig, J., dissenting).

Other federal courts have also addressed the validity of the "take" regulations under the Commerce Clause. *Shields v. Babbitt*; *Building Industry Association of Superior California v. Babbitt*, 979 F. Supp. 893 (D.D.C. 1997) (*BIA*). Adding to the peculiar mix of opinions, the district court, in *Shields*, upheld the take regulation as applied to six animal and plant species by finding that the regulation fit into the first and third *Lopez* categories. *Shields*, slip op. at 22. In so doing, the court simply adopted Judge Wald's single and singular opinion that regulating the "take" of species is a regulation of the channels of interstate commerce, *id.* at 23-24, and, in finding that the

regulation was valid under the "substantially affects" test, trotted out the unsubstantiated findings that have thus far survived challenge—that is, finding that "taking" a member of a listed species might result in the extinction of species with some as-yet-indeterminate potential future commercial use or value, or that it will inhibit interstate travel by tourists and scientists seeking to observe these species, or that the regulation itself will have impacts on other economic activities. *Id.* at 28-31. And in *BIA*, the court simply cited to the *NAHB* and *Palila* decisions, holding "[f]or the same reasons, the application of the ESA to the fairy shrimp is within Congress's commerce clause power." *BIA*, 979 F. Supp. at 907.

Finally, Fish and Wildlife itself creatively found another way to plot a route to interstate commerce:

> Moreover, a substantial amount of interstate commerce arises from the efforts of conservation organizations to protect rare species. The Nature Conservancy, a national organization that engages in substantial interstate commerce through fund-raising and sale of its publications, has sought to protect *Plagiobothrys hirtus* [a plant] through voluntary agreements and land acquisitions.

65 Fed. Reg. 3866, 3869 (Jan. 25, 2000).

As this summary points out, the lower courts and individual federal judges (and even the Fish and Wildlife Service itself) have widely varying views not only of the *Lopez* categories and the *Lopez/Morrison* substantial effects test and how they should be applied, but they also have widely varying views of just how it is that the Endangered Species Act "take" regulation does or ought to relate to interstate commerce. And though the fact that the tourism/scientific research rationale keeps appearing in these cases might lead one to conclude that the interstate commerce effects of species regulation is manifest, not even the courts that rely upon these rationales

have felt sufficiently confident of the strength or validity of these arguments in post-*Lopez/Morrison* jurisprudence that they could simply cite them and close the matter. Rather, these courts have repeatedly embarked on an analysis that entails a lengthy litany of foggy justifications for why the federal government ought to regulate plants and animals under its commerce power.

This inability to agree on a common rationale demonstrates the precariousness of the commerce argument in the first instance, and further illustrates the morass in which the lower courts find themselves. Thus, this case presents an opportunity for this Court not only to address the significant public policy implications of the narrower question presented, but to resolve the continued confusion displayed by the lower courts on how to apply the *Lopez/Morrison* test of constitutionality.

CONCLUSION

For the reasons stated above, Amici respectfully request that this court GRANT the Petitioners' Petition for a Writ of Certiorari.

DATED: January, 2001.

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IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES GILBERT GIBBS, ET AL.,

Petitioners,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR AMICUS CURIAE THE STATE OF ALABAMA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Amicus Curiae The State of Alabama submits this Brief in support of Petitioners because it takes seriously its obligation to ensure that the wildlife and habitat its residents enjoy today remain preserved, if not, indeed, improved, for future generations. The people of the State demand no less.

To assist in carrying out this obligation of stewardship, the State has been vested with "title and ownership of all wild birds and wild animals in the State of Alabama or within the territorial jurisdiction of the state . . . ." ALA. CODE § 9-11-230 (1987). The State then regulates hunting and fishing activities using civil and criminal laws and regulations, doing such things as: setting hunting seasons bag and catch limits; limiting or prohibiting the taking of young and female animals of some species; and putting some areas off limits to hunting. In performing this regulatory role, the State reconciles the interests of those who wish to use the land and wildlife for their immediate benefit and the interests of those who wish to preserve them. That reconciliation of interests is accomplished through the political process.

Alabama's support of Petitioners' challenge to the red wolf regulation is entirely consistent with its awareness of its stewardship. Rules like the red wolf rule that apply to private lands and to wildlife owned by the State risk destroying the unique benefits of divided and dispersed government. Such rules do not just preempt; they confuse. The exercise of federal regulatory jurisdiction over State-owned wildlife on private lands stifles the states' efforts to develop creative, even competitive, ways of preserving their heritage. In addition, it blurs responsibility, making local landowners look to a well-intentioned federal agency in Washington, D.C., for guidance on local land-use matters.

Accordingly, the State of Alabama respectfully submits this Brief in support of Petitioners. This Court should grant the petition and resolve the important, but unsettled, question of federal law that it presents.

ARGUMENT

The Fourth Circuit's decision in this case threatens the federal-state balance. In that decision, the court held that a regulation promulgated by the United States Fish and Wildlife Service that, as applied, limited the circumstances under which private property owners could "take" red wolves was constitutional. The red wolf population had been reintroduced on federal lands, but wolves had roamed onto private property threatening humans and livestock. The court reasoned that application of the red wolf rule to private property located within the State of North Carolina could be sustained as a valid exercise of Congress's power to regulate activities that "substantially affect" interstate commerce. The Fourth Circuit's expansive treatment of Congress' powers under the Commerce Clause preempts state activity and clouds lines of accountability. This Court's recognition of limits on the Commerce Clause power will help restore the federal-state balance without threatening endangered species in general or red wolves in particular.

1. Application of the Red Wolf Rule to Private Lands Cannot Be Sustained as an Exercise of Congress' Powers Under the Commerce Clause.

This Court has construed the Commerce Clause to permit regulation of three types of commercial activity: (1) the use of the channels of interstate commerce; (2) the instrumentalities of, or persons or things in, interstate

commerce; and (3) other activities that "substantially affect" interstate commerce. *United States v. Lopez*, 514 U.S. 549, 557–59 (1995). Neither the Fourth Circuit nor the Federal Respondents seek to sustain the rule by resort to the first two safe harbors. Rather, they contend that the rule can be sustained because it addresses activities that "substantially affect" interstate commerce.

Only three weeks ago, this Court expressed doubts regarding the validity of that approach when applied to migratory birds in *Solid Waste Agency of North Cook County v. United States Army Corps of Engineers*, 531 U.S. ___ (2001). Although this Court did not reach the constitutional question, it did hold that the application of the Migratory Bird Rule to nonnavigable, isolated, and intrastate waters was not a valid exercise of agency regulatory authority. This Court explained that the attempt to sustain the Migratory Bird Rule by resort to the power to regulate activities that "substantially affect" commerce raises "significant constitutional and federalism questions." *Id.* at ___ (slip op. at 13). With respect to the constitutional problems, the Court explained, "[W]e would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce." The Court then noted that the outcome of that evaluation "is not clear . . . ." *Id.* With respect to federalism, the Court stated:

> Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the "Migratory Bird Rule" would result in a significant impingement of the States' traditional and primary power over land and water use. *See, e.g., Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments"). Rather than expressing a

> desire to readjust the federal-state balance in this manner, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b).

Id. Concluding that the rule's application could not be sustained under the statute, this Court found it unnecessary to address those serious and vexing questions.

This Court should proceed to address the constitutional issue raised in this case, an issue that is almost identical to the issue raised in *Solid Waste Agency*. It is squarely and unavoidably raised. Moreover, it is likely to recur in the context of endangered species protection. In *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), for example, the court rejected a challenge to the application of the Endangered Species Act to the Delhi Sands Flower-Loving Fly, an insect that lives solely in southwestern San Bernardino County and northwestern Riverside County in California As Judge Sentelle, dissenting, observed, "The Delhi Sands Flower-Loving Fly is an inveterate stay-at-home, a purely intrastate creature." *Id.* at 1063 (Sentelle, J., dissenting). After the red wolf and the Delhi Sands Flower-Loving Fly, it is inevitable that some other endangered species will find its way onto private property and cause a criminal prosecution, the derailing of a hospital project, or other injury to State and local interests. Most important of all, however, this Court should proceed to address the constitutional question because the Fourth Circuit incorrectly applied this Court's decisions and, as a result, failed to recognize the limits to Congress' Commerce Clause powers.

Whether in upholding federal legislation or in invalidating it, this Court has long stood by the

rudimentary principle that Congress's commerce powers are not unlimited. As a matter of first principles, the Constitution creates a Federal Government of enumerated powers, all of which — the Commerce Clause included — are "subject to outer limits." *United States v. Lopez*, 514 U.S. at 557. The Commerce Clause does not "obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). "The activities that are beyond the reach of Congress are 'those within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.'" *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824)).

This Court's recent decisions have found limits to the Commerce Clause's ability to reach activities that are said to substantially affect interstate commerce. In *United States v. Lopez*, the Court held that possession of a firearm in a school zone was not an activity that substantially affected interstate commerce. Similarly, in *United States v. Morrison*, 120 S. Ct. 1740 (2000), the Court held that the Commerce Clause did not reach purely intrastate violent criminal activity. In both cases, the Court questioned whether the activity at issue was "commercial" at all. *See Lopez*, 514 U.S. at 561 ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic activity, however broadly one might define those terms."); *Morrison*, 120 S. Ct. at 1751 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.")

Furthermore, in both *Morrison* and *Lopez*, the Court rejected attempts to aggregate the economic effects of

noncommercial activity. In *Lopez*, the Court rejected the suggestion that gun possession on school grounds substantially affected interstate commerce because violent crime imposes costs, deters travel, and adversely affects the learning environment. *Id.* at 564–65. In *Morrison*, the Court again rejected the argument that a substantial effect arose from a "but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce." *Morrison* at 1752. The Court observed that such theories left it "hard pressed to posit any activity by an individual that Congress is without power to regulate." *Lopez* at 564. Thus,

> While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity . . . thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.

Morrison, 120 S. Ct. at 1751.

The Fourth Circuit's rationale in sustaining the red wolf rule is just as flawed as the arguments by aggregation rejected in *Lopez* and *Morrison*. At the outset, it cannot be said that the wolves themselves are engaged in commercial activity, so the argument by aggregation is designed to justify regulation of noneconomic activity. The Fourth Circuit and the United States point to the effect of the wolves' predatory activity on local ranchers, the research and howling sessions, and the possibility of trade in pelts to provide the necessary substantial effect on interstate commerce. *See* Pet. App. 17a–24a; Br. for the Federal Respondents in Opp. at 12–14. These suggestions fail both jointly and severally.

Looking at the economic effect of the wolves' predatory activity is misguided because the Federal Respondents started the process that produces those effects. The Federal Respondents released red wolves on federal land in an attempt to reintroduce them into an area they no longer inhabited; red wolves strayed from federal lands onto private lands; and those wolves have threatened people, killed livestock, and caused other harm. The economic value of the livestock killed is part of the but-for chain of causation set in motion by the Federal Respondents. Put simply, the Federal Respondents have externalized costs that they now point to as justification for their action. *But cf. Christy v. Hodel*, 857 F.2d 1324, 1334–35 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989) (no takings claim for depredations of grizzly bears). The citations to scientific study and tourism are simply reiterations of the travel argument rejected in *Lopez*. *Id.* at 564 ("[V]iolent crime reduces the willingness of individuals to travel to areas with in the country that are perceived to be unsafe.") Finally, the possibility that trade in pelts may result from loosening the restrictions on taking red wolves does not require federal regulation of private property. It can constitutionally be addressed by regulating trade in pelts.

The inadequacy of these arguments leaves only biodiversity as an asserted justification for the regulation of private property. *See, e.g.*, Federal Respondents' Br. at 14–15. Once again, this is a justification that has no limits: As the Federal Respondents put it, "[I]ndividual species are part of an interdependent web, and . . . the significance of a particular species cannot always be easily determined at a given point in time." *Id.* But, as Judge Sentelle put it in his dissent in *National Ass'n of Home Builders v. Babbitt*:

> A creative and imaginative court can certainly speculate on the possibility that any object cited in any locality no matter how intrastate or isolated might someday have a medical, scientific, or economic value which could then propel it into interstate commerce. There is no stopping point. If we uphold this statute under Judge Wald's first rationale [*i.e.*, biodiversity], we have indeed not only ignored *Lopez* but made the Commerce Clause into what Judge Kozinski suggested: the "hey-you-can-do-whatever-you-feel-like clause."

130 F.3d at 1065 (Sentelle, J., dissenting) (quoting Judge Alex Kozinski, *Introduction to Volume 19*, 19 HARV. J. L. PUB. POL. 1, 5 (1995)). As with the Delhi Sands Flower-Loving Fly involved in *Home Builders*, nobody even suggests any present or foreseeable place that the red wolf population in this portion of North Carolina has in the chain of life on the planet. Such entirely speculative reasoning cannot suffice to show a substantial effect on interstate commerce.

Thus, the red wolf rule cannot be justified as a measure that regulates an activity or activities that substantially affect interstate commerce. The wolf is not engaged in commerce, and the arguments by aggregating the effects of a but-for causation chain admit of no limits. The rule is not a permissible exercise of Congress's Commerce Clause powers.

The inadequacy of the Commerce Clause as a source of authority for regulating the taking of red wolves on private property does not leave Congress powerless. Rather, Congress can use its powers under the Spending Clause to acquire habitat or to encourage States to take measures to protect endangered species generally or the red wolf in particular. *North Dakota v. United States*, 460 U.S. 300 (1983); *see also* 16 U.S.C. § 1535(a)(5) (declaring

it appropriate to "encourag[e] the States and other interested parties, through federal financial assistance and a system of incentives, to develop and maintain conservation programs . . . .") Congress or federal regulatory agencies can prohibit hunting in general or the hunting of particular species on federal lands. *Kleppe v. New Mexico*, 426 U.S. 529 (1976). As noted above, Congress can proscribe trade in wolf pelts or other parts of wolves or other endangered species. *Andrus v. Allard*, 444 U.S. 51, 63 & n.19 (1979). Finally, endangered species that live within the navigable waters of the United States can be protected because such waters are "channels" of commerce. *Douglas v. Seacoast Products*, 431 U.S. 265 (1977).

In sum, the application of the red wolf rule to private property cannot be justified as an exercise of the Commerce Clause power. If Congress desires to protect the wolves, it must do so using a different power. It is up to the States to regulate noncommercial activities on private property within their borders, a conclusion that leads to the second major problem with the Fourth Circuit's opinion.

2. Application of the Red Wolf Rule to Private Lands Under the Authority of the Commerce Power Displaces State Regulatory Power and Upsets the Federal-State Balance.

Of the two sovereigns that claim an interest in endangered species on private lands, the States' interest is superior. The United States' interest purportedly arises from the Commerce Clause and dates back to 1973 when the Endangered Species Act became law. The States' interest is territorial and grounded in antiquity. As this Court observed more than 100 years ago , "From

the earliest traditions the right to reduce animals *ferae naturae* to possession has been subject to the control of the law giving power." *Geer v. Connecticut*, 161 U.S. 519, 523 (1896). North Carolina, where the Petitioners reside or are located, has codified this interest:

> The marine and estuarine and wildlife resources of the State belong to the people of the State as a whole. The Department [of Environment, Health, and Natural Resources] and the Wildlife Resources Commission are charged with stewardship of these resources.

N.C. GEN. STAT. § 113-131(a) (1999); *see also* ALA. CODE § 9-11-230 (1987) (vesting "title and ownership of all wild birds and wild animals in the State of Alabama or within the territorial jurisdiction of the state" in the State). Moreover, with respect to red wolves, North Carolina has attempted to vindicate its interest. As the Petition and the lower court opinions show, the North Carolina General Assembly, the County Commissions of Hyde County and Washington County, and the North Carolina Department of Agriculture have objected to the introduction of red wolves or to the effects of their incursion on private land. Pet. at 5; Pet. App. 7a–8a, 62a–63a.

The Fourth Circuit's decision allows the Commerce Clause to be used to displace this superior State interest. One effect is to blur lines of responsibility in a way that is detrimental to the federal-state balance. In *Printz v. United States*, this Court noted that, by commandeering local chief law enforcement officials into a federal regulatory program, Congress had taken credit for solving a problem by shifting the burdens of compliance:

> By forcing state governments to absorb the financial burden of implementing a federal

> regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

521 U.S. 898, 930 (1997). A similar situation arises when endangered species on private lands are protected. In this case, the democratically elected State and local governing bodies have been deprived of the ability to regulate activity that takes place in their jurisdictions. The people of Hyde and Washington Counties and North Carolina should look to their elected representatives for a solution to any problems caused by the red wolves' incursions onto private property, but they cannot.

Beyond blurring lines of accountability, the invocation of Commerce Clause power to regulate noneconomic activity on private lands stifles State efforts. Two examples will illustrate this point. First, as the Fourth Circuit and the District Court noted in this case, North Carolina passed a conflicting red wolf law that applies to Hyde and Washington Counties and, as amended, to Beaufort and Craven Counties. Pet. App. 7a–8a, 62a–63a (citing 1994 N.C. Sess. Laws ch. 635; 1995 N.C. Sess. Laws ch. 83). Those laws provide greater protection to the owners of land and stock from the predatory activities of red wolves. Even as they afford landowners more protection, however, they are deferential to the United States Fish and Wildlife Service in that: (1) the laws are predicated on a finding that "efforts by the U.S. Fish and Wildlife Service to trap and remove wolves have not been successful in removing wolves for a significant period of time"; (2) any action by the landowner is conditioned on a

prior request that the Service remove the wolves from the landowner's property; and (3) any killing of a wolf must be reported to the Service within 48 hours. *See* 1994 N.C. Sess. Laws ch. 635. Again, while this legislation implicitly recognizes that the wolves can become pests, the injury results because the Federal Government reintroduced the wolves to nearby federal lands, the wolves, being *ferae naturae*, have roamed, and the Fish and Wildlife Service has been unable to remove the wolves from the landowner's property.

Second, with respect to a game species that is not endangered, Alabama formerly prohibited the hunting of doe and unantlered male deer. ALA. CODE § 9-11-239 (1987) (repealed 1991). Such restrictions are responsive to a scarcity of deer and help the species to propagate and survive. This statute was superseded in 1966 by a statute that allowed the Commissioner of Conservation and Natural Resources to open a season for hunting female or unantlered male deer by regulation "when, in his best judgment, he deems it necessary for biological reasons or because of crop damage to open the season on such deer . . . ." ALA. CODE § 9-11-240 (1987). Section 9-11-239 was repealed in 1991. *See* Act of Sept. 19, 1991, No. 91-750, § 2, 1991 Ala. Acts, 1st Ex. Sess. 129, 130. Clearly, the deer population of Alabama had recovered to the point where deer were becoming pests and the prohibition on hunting female or unantlered male deer was no longer necessary. Now, the Commissioner of Conservation and National Resources can adjust the hunting seasons for game and nongame animals in response to the animal population and the needs of the local community, including the hunters. In other words, the Commissioner can act as a steward of these resources.

These examples show that the States can protect the natural resources within their borders. Because of

competing political demands, not everyone is happy with what the States do. But, that unhappiness does not mean that the States are abdicating their stewardship responsibilities.

In *Lopez* and *Morrison*, this Court noted that the laws in question infringed on areas in which the States had historically been sovereign. In *Lopez*, the Court observed that the "national productivity" reasoning, which posited that guns in schools hurts education producing, ultimately, a less productive citizenry, would mean that

> Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.

514 U.S. at 564; *see also Morrison*, 120 S. Ct. at 1753. The States' sovereignty and regulatory authority over the lands and wildlife within their boundaries are no less historically grounded. Indeed, in *Solid Waste Agency*, this Court referred to the "States' traditional and primary power over land and water use." 531 U.S. at ___ (slip op. at 13). Just as in *Lopez* and *Morrison*, this Court should protect the federal-state balance by keeping federal regulatory activity within constitutional bounds.

CONCLUSION

For the reasons stated in the Petition and in this amicus brief, the Court should grant the writ of certiorari and, on review, reverse the decision of the United States Court of Appeals for the Fourth Circuit.

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Petitioners,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

Petitioners have asked the Court to decide whether 50 C.F.R. § 17.84(c)—a Fish and Wildlife Service regulation prohibiting the "taking" of red wolves the government has released in North Carolina—is a valid exercise of the federal government's commerce power. In a rushed "midnight brief" filed on January 19, the federal respondents urge the Court to allow the decision below to stand. Respondent Defenders of Wildlife ("DoW") also asks the Court to deny review. Petitioners rebut below respondents' principal contentions.

ARGUMENT

1. Respondents all but ignore this Court's recent decision in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, No. 99-1178 (Jan. 9, 2001) ("*SWANCC*"), in which the Court held that the so-called "migratory bird rule" was not a permissible administrative interpretation of the Clean Water Act. As four Justices have already recognized, the migratory bird rule is directly analogous, in its constitutional dimension, to the red wolf regulation. Slip op. 23 (Stevens, J., dissenting); *see* Pet. 9-15. Thus, contrary to respondents' assertion, the *SWANCC* ruling casts substantial doubt on the lower court's ruling in this case.

The government states that, in *SWANCC*, "[t]he Court ultimately issued no constitutional holding." U.S. Br. 17; *see also* DoW Br. 14 ("The Court . . . decided *SWANCC* without reaching any constitutional issue"). That is incorrect. The Court expressly rejected the government's argument that the Court should defer to the interpretation of the statute given it by the agency, be-

cause the Court determined that "significant constitutional questions [are] raised by respondents' application of their regulations." *SWANCC*, slip op. 13. In the absence of such constitutional questions—the same constitutional questions presented in this case—the Court would have been bound to defer to the administrative interpretation. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Thus, the "constitutional holding" of *SWANCC* is that the migratory bird rule raised sufficiently serious questions regarding the federal government's authority, under the Commerce Clause, to regulate wild animals that the traditional rule of deference would not be applied.

The government asserts in the alternative that "the constitutional concerns identified by the Court in [*SWANCC*] are inapplicable here." U.S. Br. 18. That is because, according to the government, the red wolf regulation (unlike the migratory bird rule) neither alters the federal-state balance nor intrudes on state power over land use. *Id.* That also is incorrect. The States, not the federal government, have traditionally regulated the wild animals within their borders (*see* Pet. 26-27), and the red wolf regulation infringes that authority as surely as the migratory bird rule. The States also have traditionally exercised authority over agriculture, animal husbandry, and the like. *See, e.g.*, *The Federalist* No. 17, at 118 (Hamilton) (Clinton Rossiter ed., 1961) ("the supervision of agriculture and of other concerns of a similar nature . . . which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction"); *see also* Ala. Amicus Br. 9-13. The red wolf rule, which purports to override a North Carolina statute specifically authorizing the killing of red

wolves in certain circumstances, intrudes on this area of state concern. Pet. 5, 26.

Indeed, any doubt regarding the implications of *SWANCC* for this case is laid to rest by the dissenting opinion. Four Justices were of the view that the migratory bird rule "falls well within the boundaries set by this Court's Commerce Clause jurisprudence." Slip op. 20 (Stevens, J., dissenting). What's more, *they specifically cited the decision below* to support their reasoning. *Id.* at 23. The dissent thus recognized that precisely the same "significant constitutional questions" that troubled the majority in *SWANCC* are squarely raised by this petition. Respondents may wish to pretend that *SWANCC* has nothing to do with this case, but the decision speaks for itself. *See also* "The Glancing Geese Test," Wall St. J., Jan. 16, 2001, at A26.

2. Respondents note that other courts have sustained the constitutionality of regulations promulgated under the Endangered Species Act. U.S. Br. 10-11; DoW Br. 9-10. They do not even address, however, the fact that every appellate decision on this subject has drawn a dissent, nor do they discuss the extensive scholarly debate regarding the constitutionality of such regulations. *See* Pet. 20-24; *see also Cargill, Inc.* v. *United States*, 516 U.S. 955 (1995) (Thomas, J., dissenting from denial of certiorari). The fact is (as *amici* NAHB and PLF have demonstrated) that significant confusion exists regarding the constitutionality of certain environmental regulations in the wake of *United States* v. *Morrison*, 120 S. Ct. 1740 (2000), and *United States* v. *Lopez*, 514 U.S. 549 (1995), and that confusion will only be exacerbated by the Court's holding in *SWANCC* that the migratory bird rule raises serious constitutional questions. The confu-

sion can be promptly and directly alleviated by granting review in this case.

3. Respondents contend, incorrectly, that petitioners' challenge is really to Section 9 of the ESA, 16 U.S.C. § 1538, rather than to the red wolf regulation. U.S. Br. 11-12; DoW Br. 21-22. On the contrary, petitioners challenge the administrative decisions to release red wolves in proximity to private lands and simultaneously to generally prohibit landowners from "taking" those wolves even where they pose a threat to people or property. DoW's effort (Br. 6) to portray red wolves as harmless is belied by the fact that FWS, the federal agency responsible for the reintroduction program, has recognized that red wolves are "behaviorally unsuitable animal[s]" that present "a demonstrable . . . threat to human safety." *See* Pet. 17. While petitioners contend that the regulatory prohibition on taking these predators on private land is unconstitutional, they do not challenge, as respondents misleadingly assert, the anti-"take" provision of the ESA in regard to any other species. As Judge Luttig recognized, "the simple (and frankly, considerably less incitant) question of law for [the Court] to decide is whether, assuming its validity under [the ESA], this one particular Fish and Wildlife regulation exceeds Congress' power under the Commerce Clause." Pet. App. 47a-48a (dissenting opinion).

As the government acknowledges, the red wolf is an "experimental population" under the ESA, "which grants the Secretary broad flexibility in promulgating regulations to protect such species. *These regulations can even allow the taking of threatened animals.*" U.S. Br. 4 (quoting H.R. Rep. No. 567, 97th Cong., 2d Sess. Pt. 1, at 34 (1982)) (emphasis added). In the absence of

the administrative determination to release red wolves in North Carolina, red wolves would not be threatening petitioners' families and property. And, if FWS had exercised its discretion to allow the "taking" of red wolves, petitioners would not have had cause to challenge the reintroduction program. Thus, it is only the constitutionality of the red wolf regulation, and *not* the ESA as a whole, that is at issue here.

4. Respondents assert that red wolves have a substantial effect on interstate commerce. U.S. Br. 12-15; DoW Br. 17-19. For the most part, respondents simply parrot the reasoning of the court of appeals, which has already been addressed. *See* Pet. 11-13; Pet. App. 48a-50a (Luttig, J., dissenting). The government directs the Court's attention to the commercial motivations of particular individuals (U.S. Br. 12), even though this Court has always focused upon the class of regulated activities as a whole. *See SWANCC*, slip op. at 13 ("although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now, *post litem motam*, focus upon the fact that the regulated activity is petitioner's municipal landfill, which is 'plainly of a commercial nature'"); *see also* NAHB Amicus Br. 7-8; PLF Amicus Br. 9-10. And respondents endorse the majority's wild speculation regarding a future trade in wolf pelts (U.S. Br. 13-14; DoW Br. 19), without even addressing petitioners' observation that such reliance on remote possibilities is foreclosed by this Court's decision in *Jones* v. *United States*, 120 S. Ct. 1904 (2000). *See* Pet. 24-26. Moreover, while the government criticizes "petitioners' demand for specific proof of the red wolf's near-term commercial importance" (U.S. Br. 14), the government

ignores the fact that it is not petitioners but the Commerce Clause, as interpreted in *Lopez* and *Morrison*, that imposes such a requirement—which the government manifestly has failed to satisfy.

The dissenting Justices in *SWANCC* recited precisely the same considerations on which the court of appeals' decision rested and respondents now rely. *See* slip op. 20-24 (Stevens, J., dissenting). The dissent even cited the decision below in support of its reasoning, as already noted. *Id.* at 23. By not addressing the dissent's arguments in the opinion, the *SWANCC* majority implicitly rejected them. *See, e.g., Clemons* v. *Mississippi*, 494 U.S. 738, 747-48 n.3 (1990). Indeed, had the Court accepted the dissent's rationale (or that of the court below in this case), it would not have found serious constitutional questions with respect to the migratory bird rule—questions equally inherent in the red wolf regulation.

Perhaps recognizing that the handful of red wolves in North Carolina has no impact on interstate commerce, the government urges the Court to "focus on the aggregate commercial significance of all listed species" (U.S. Br. 14)—that is, every animal considered threatened or endangered under the ESA. It contends that "individual species are part of an interdependent web," while explaining unapologetically that "the significance of a particular species cannot always be easily determined at a given point in time." *Ibid.* DoW similarly argues that "[d]estroying natural resources" necessarily affects commerce, and conflates unequivocally commercial *activities* like surface coal mining with patently noncommercial matters like wildlife management. DoW Br. 17-18. These arguments prove too much: With sufficient aggregation, *everything* could be said to affect com-

merce. The government's "global Gaia" approach is thus as constitutionally infirm as the "glancing geese" test invalidated in *SWANCC*. *See Lopez*, 514 U.S. at 564 ("if we were to accept the Government's arguments, we are hard pressed to posit any activity . . . that Congress is without power to regulate"); *id.* at 565 ("depending on the level of generality, any activity can be looked upon as commercial"). In any event, petitioners have challenged only the red wolf regulation, and that regulation must be sustained, if at all, on the basis of *red wolves*' connection, if any, to interstate commerce. As the Court explained in *SWANCC*, to sustain the migratory bird rule, it "would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce." Slip op. 13. Here, the object of the regulation is red wolves, which, even in the aggregate, simply do not affect commerce.

Relying on *TVA* v. *Hill*, 437 U.S. 153 (1978) (which involved the environmental impact of *federal*, not private, action), respondents nevertheless insist that the value of a species is "incalculable" and that "extirpation of a species eliminates for all time the possibility of future commercial uses." U.S. Br. 15; *see also* DoW Br. 18. But this observation, even if constitutionally meaningful, is irrelevant: Before releasing any red wolves in North Carolina, FWS made a determination that those wolves were "nonessential" to the survival of the species. Pet. 19. Even if the "extirpation" of the red wolf species would affect commerce, therefore, the elimination of the wolves in North Carolina would not. *See* Pet. App. 50a (Luttig, J., dissenting).

5. Respondents assert that federal involvement in protecting wildlife is of long standing. U.S. Br. 15-16,

18; DoW Br. 20-21. The cases cited for this proposition, however, demonstrate the futility of their Commerce Clause defense of the red wolf regulation. As the Court explained in *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (cited in U.S. Br. 15-16), "[a]lthough States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government *when the Federal Government exercises one of its enumerated constitutional powers*." 526 U.S. at 204 (emphasis added). As the cases cited by the *Mille Lacs* Court illustrate, this Court has previously approved federal environmental regulations based on the property power and the spending power. *See* Pet. 27. But, in the absence of such an enumerated federal power (as is the case here, contrary to DoW's unsupported assertion (Br. 12)), the regulation of wildlife is a matter solely of state concern.

As petitioners have pointed out (Pet. 27), and respondents have made no effort to refute, the Court has *never* approved federal regulation of wildlife, *qua* wildlife, under the Commerce Clause. The sole Commerce Clause case cited by the government, *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265 (1977) (*see* U.S. Br. 16), held that Congress's power to regulate navigable waters (*i.e.*, the channels of commerce) included the power to regulate commercial extraction of fish from those waters. But the red wolves at issue here bear no such relation to commerce. Similarly, *Andrus* v. *Allard*, 444 U.S. 51 (1979) (misdescribed in DoW Br. 20), stands for the rather unexceptional proposition that Congress can regulate interstate *commercial transactions* involving captured animals. 444 U.S. at 63 n.19. The only other case cited by the government on this point,

Missouri v. *Holland*, 252 U.S. 416 (1920) (*see* U.S. Br. 16), sustained, as the government says, the Migratory Bird Treaty Act as a valid exercise of the treaty power; what the government neglects to mention, however, is that the Court *rejected* the government's argument that the statute was also sustainable under the Commerce Clause. *See* Pet. 27.*

6. The government contends that "protection of endangered species from takings on private lands is essential to the achievement of the ESA's objectives." U.S. Br. 16. But that contention begs the Commerce Clause question in this case. The Court may accept, *arguendo*, the notion that prohibiting citizens from "taking" red

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* DoW suggests that Commerce Clause analysis is unnecessary in this case because the red wolf regulation can be upheld under the treaty power. DoW Br. 23-24. Tellingly, this argument is not made by the government, nor was it relied upon by the courts below (or indeed by any post-*Lopez* court). After all, as this Court has explained, "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Reid* v. *Covert*, 354 U.S. 1, 16 (1957) (plurality opinion). The sweeping approach to the treaty power proposed by DoW would completely eviscerate this Court's Commerce Clause jurisprudence (and the doctrine of enumerated powers generally), as was undoubtedly understood when the Court ignored similar arguments raised by *amici* in *Morrison*. Moreover, this case presents none of the uniquely international concerns animating the treaty upheld in *Missouri* v. *Holland*. *See* 252 U.S. at 431 (noting that "many species of birds in their annual migrations traversed certain parts of the United States and of Canada"). The historical range of the red wolf is "the southeastern United States" (DoW Br. 5), and there is no evidence that any of the wolves at issue crossed a state line, much less an international border.

wolves on their own property is "essential" to some objective of the ESA. The question remains whether such a prohibition is *authorized* by our Constitution. Simply because the ends of a statute may be laudable does not mean that the federal government has the constitutional means to accomplish them by regulation.

Finally, respondents note that in *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), "[n]o member of the Court suggested that the ESA . . . might exceed Congress's power under the Commerce Clause." U.S. Br. 11 n.4; *see also* DoW Br. 16. Of course, in *Sweet Home*, no party *raised* a constitutional issue, and the Court had no occasion to consider one. The decision thus has no weight on any constitutional issue, much less the constitutionality of the specific regulation challenged by petitioners. *See, e.g.*, *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 63 n.4 (1989). Indeed, the Court has *never* considered the constitutionality of a regulation promulgated under the ESA, and in the only case involving a federal attempt to regulate on the basis of the presence of wild animals, the Court concluded that the exertion of such authority "raise[s] serious constitutional questions." *SWANCC*, slip op. 13. Those questions can be resolved by granting certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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